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In The

Supreme Court of the United States

October Term, 1996

RICHARD GLANTON, Individually and as a Trustee of The Barnes Foundation; NIARA SUDARKASA, Individually and as a Trustee of The Barnes Foundation; SHIRLEY A. JACKSON, Individually and as a Trustee of The Barnes Foundation,

Petitioners,

vs.

KENNETH E. DAVIS, JAMES S. ETTELSON; ALAN C. KESSLER; FRANK LUTZ; JOSEPH M. MANKO; ORA R. PIERCE; JAMES J. PRENDERGAST; BRIAN D. ROSENTHAL; DAVID A. SONENSHEIN; HOWARD L. WEST; GLORIA P. WOLEK; PHYLLIS L. ZEMBLE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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142 pp

QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1443, which permits removal of cases involving equal rights denied or not enforceable in state court, permits removal of a state court civil suit filed by public officials retaliating against the filing of an equal civil rights suit in the district court.

2. Whether under 28 U.S.C. § 1447(c) and (d) (limiting appellate review) appellate review is available of a non-jurisdictional remand to state court of a removal under 28 U.S.C. § 1441 (Federal question removal), joined with other removal jurisdiction.

3. Whether 42 U.S.C. § 1985(3) (Ku Klux Klan Act) permits removal to afford protection from retaliation against Section 1985(3) suit seeking relief for race-based discrimination, where local public official defendants therein invoke state common law making actionable an expression that public officials are motivated by racism, seeking to chill speech and litigation to assert equal civil rights in Federal Court.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Charles Frank, W. Bruce McConnel, III and Regina H. Silver were parties to the proceedings in the courts below.

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Richard H. Glanton, Niara Sudarkasa, and Shirley A. Jackson, individually and as trustees of The Barnes Foundation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported at 107 F.3d 1044 and is reproduced at Appendix A, pages 1a-20a of the appendix (hereinafter "Slip Op., App. A"). The opinion of the District Court (App. B) is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 3, 1997 (Appendix A, p. 1a) and is reproduced at Appendix A, pp. 1a-20a of the appendix (hereinafter "Slip Op., App. A.). The Court of Appeals denied a petition for rehearing, and entered an order to that effect on April 1, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. §§ 1441(a), 1443(1), 1447(d), 1651; Title 42 §§ 1983, 1985(3), as set out in appendixes D through I.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioners are African-American trustees of The Barnes Foundation, an art education institute and repository concentrating in French Impressionist art. Respondents constitute almost all the fourteen Commissioners of Lower Merion Township, a virtually all-white suburban community adjacent to Philadelphia, where the Barnes is located. On March 4, 1996, the Commissioner respondents sued Petitioners, each African Americans who were Trustees of The Barnes Foundation as of November 1995.[1] Appellants removed

1. Originally one of the two white Trustees was also sued, but he was later (Cont'd)

the case to the District Court under 28 U.S.C. §§ 1441, 1443(1) and 1651.

On January 18, 1996, The Barnes Foundation had sued the Township, the Respondent Commissioners and certain neighbors of the Barnes property, in the U.S. District Court for denial of civil rights under 42 U.S.C. § 1983, and for conspiring to deny their federal equal civil rights because of their race, in violation of 42 U.S.C. § 1985(3) (Ku Klux Klan Act). Section 1985(3) bars conspiracies to deprive persons "directly or indirectly" of equal federal civil rights. Six weeks later, the respondents filed this action in their home county, of which Lower Merion Township is the largest subdivision.

The Respondent Township Commissioners alleged in this case that the petitioner trustees had engaged in a "smear campaign" against them, consisting of accusing them of racism, in the federal civil rights action as well as reported in a newspaper interview (App. F, p. 64a), published in November, 1995. There, the President Trustee of the Foundation, petitioner Richard Glanton, Esquire, was reported as asserting that the way that the Barnes was being treated (not identifying by whom), reflected "thinly disguised racism".[2] The commissioners did not sue the newspaper nor the Foundation, which latter would have necessitated a compulsory counterclaim in the Federal Court.

Alleging that the "smear campaign" was libelous, the respondent commissioners sought damages, both compensatory and

(Cont'd)

voluntarily dropped as a defendant. Two of the Commissioners have not joined in the suit, one a former student at the Barnes, and the other whose name had been placed on the suit, without his knowledge, and who directed that it be removed. Respondent Commissioners include the sole African American member of the Township Board of Commissioners.

2. The other named trustees were alleged to have conspired with or allowed petitioner Glanton to act recklessly.

punitive, as well as an injunction restraining the respondent trustees from suggesting or inferring that respondents "are acting out of racism or discrimination toward any [defendant] trustee". (Complaint, ¶¶ 48, 52 and 99 and Wherefore Clause). A recently adopted Pennsylvania Supreme Court rule of law establishes that allegations of racial motivations on the part of public officials may constitute actionable libel.[3] The same attorney represents the commissioner respondents in both cases. He stated in the press and in depositions, respectively, that the purpose of this case is to "cause pain", and "stop" the Petitioners from discussing racism. (Reply Brief in Third Circuit, p. 11).

Believing this action to be retaliation against them for having filed the federal action, and to involve the same issues, petitioner Trustees removed the case to the District Court pursuant to 28 U.S.C. § 1441 (federal question jurisdiction), and Section 1443(1) (where persons are denied or cannot enforce in state court equal civil rights.) Alternatively, the petitioners asserted that federal jurisdiction should be taken pursuant to 28 U.S.C. § 1651 (the All Writs Act), in order to hear the overlapping issues together.

The District Court remanded. Despite acknowledging the retaliatory aspects, and the common facts, it reasoned that there was no federal question involved in the state court suit, eliminating Section 1441. (Slip. Op., App. B, p. 21a). As to Section 1443, it found that the petitioners had not "adequately developed" their claim of being denied or unable to enforce or as required by Section 1443(1) in their papers or at oral argument, and/or that retaliation for the pending Section 1985(3) action does not qualify for removal under Section 1443. It held that this Court's decision in *Georgia v. Rachel*, 384 U.S. 780 (1966), was "significantly narrowed" by the same day decision written by the same Justice in *City of Greenwood v. Peacock*,

3. The theory is that such allegations effectively accuse the public official of misconduct, because public officials cannot legally be motivated by hidden motives such as racism. *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050 (Pa. Sup. Ct. 1996).

384 U.S. 808 (Slip. Op., App. B at 24a-25a). It held petitioners had relied on *Rachel* and had not addressed what it called the "narrowed" standard of *Peacock*, and had hence "tacitly conceded" they could not meet its test. It concluded that it did not choose to exercise jurisdiction under the All Writs Act, 28 U.S.C. § 1361, simply citing to the case law tests. (App. B at 25a-28a).

On appeal, the Third Circuit affirmed, as to Section 1443(1). It reasoned that the petitioner trustees could defend against the Section 1985 retaliation by defending in the state court suit. (Slip Opinion, App. A at 15a-19a).

The Court of Appeals considered that the case was controlled by the decisions of this Court in *Greenwood v. Peacock, supra,* and *Georgia v. Rachel, supra*, While holding that *Peacock* did not narrow *Rachel*, however, it did not note that *Rachel* and *Peacock* both dealt with removal of state criminal prosecutions, with no prior federal action pending (*Id.* at 10a-11a).

Applying the *Rachel-Peacock* standard, the Court of Appeals declined to determine whether Section 1985(3) fits the requirements of the first "prong" of the *Rachel-Peacock* "two prong" test, *i.e.*, that the statute invoked to provide for equal civil rights, not merely civil rights, calling the question a "difficult issue". (*Id.* at 14a). It acknowledged the intention of Section 1985(3) to prevent race-based conspiracies, but held that petitioners did not meet the "second prong", *i.e.*, to show they could not sustain their federal civil rights through defending what it called the "defamation action." It held that the federal civil rights law must explicitly forbid retaliation, to allow removal of a retaliatory suit, on the second prong. (*Id.* at 15a-19a).

Since, in its view, the petitioners did not have a statutory right to be free of litigation of the claims herein, and could not show that state law precluded such a defense, the Court concluded the petitioner Trustees could not remove. (*Id.* at 19a). The Court did

not address the effect of the state law of *MacElree*, making the phrase "racism" actionable, as impeding the ability to protect equal civil rights in the state court.

Crucially, the Court of Appeals acknowledged the retaliatory motivation potential of the "defamation case" but held it irrelevant to removal jurisdiction under Section 1443. (*Id.* at 17a-19a). *It gave no reason for this conclusion.*

It held that the Sixth Circuit decision in *Conrad v. Robinson*, 871 F.2d 612 (6th Cir. 1989), sustaining removal of a retaliatory "slap" suit was different because *Conrad* involved removal of a Title VII (42 U.S.C. § 2000(e) retaliation claim. (*Id.* at 18a-19a).

As to the pending federal case, the Court of Appeals also acknowledged in its peroration that the "facts" and allegations of racial bias "suffuse" with those of the preexisting federal case. But, based on unstated considerations of "the rigors of federalism and unspecified "precepts of governing," it held that fact not to affect the outcome. It stated:

> We are not insensitive to the point so effectively made by the Trustees' able counsel that the events that form the basis of the state court defamation action stem from the same set of facts as those underlying the federal civil rights action, and that, since allegations of racial bias suffuse the litigation, which is anchored in federal court, the defamation action too must be heard there in order to assure that civil rights are not compromised. But this view ignores the rigors of federalism, and the technical precepts of governing by dint of which the principles of federalism are translated into reality.

(Slip Op., App. A at 19a).

The Court of Appeals likewise dismissed *Sofarelli v. Pinellas County*, 931 F.2d 718 (11th Cir. 1991); and *Whatley v. City of Vidalia*, 399 F.2d 521 (5th Cir. 1968), as distinct because they were both based on 1960's legislative language prohibiting prosecution. (*Id.* at 17a-18a).

Crucially, also, the Court of Appeals assumed without discussion that the *Rachel-Peacock* two prong concept was applicable to determine removability in all cases arising under Section 1443(1). The Court assumed that even though *Peacock* and *Rachel* had formulated a test in its context of historical federal reluctance to interfere with the state criminal policing policies, that such test would or should apply to a civil retaliation suit against a pending Section 1985 federal civil suit. (*Id.* at 7a-11a).

Although the Court of Appeals recognized that Section 1985(3), the Ku Klux Klan statute, was addressed to racially motivated suppression, and has been narrowly limited to discrimination against classes, creating difficulty for its result, nevertheless that Court did not consider it in applying the two prong test in the circumstances. It did not explain its failure to consider those historic facts in determining the application of Section 1443(1); its approach indicates it felt obligated to simply apply *Peacock-Rachel.*

The Court of Appeals did not consider the impacts its result has on retaliatory cases chilling Section 1985(3) rights. When the Court purported to distinguish *Conrad*, therefore, it did not address how failing to uphold removal of lawsuits which retaliate for an attempt to enforce equal civil rights against violations described in Section 1985(3) would affect Section 1985(3) rights.

As to the remand of the Section 1441 removal (federal question), the Court of Appeals dismissed the appeal, holding that review of such a remand is barred by Section 1447(d) (no review of remands other than Section 1443, a bar confined by this Court to certain remands).

In its terse disposition of Section 1441, the Court did not discuss whether the "no review" language of Section 1447(d) applies where the Section 1441 remand was based not on a conclusion that subject matter jurisdiction was lacking, but on the District Court's prediction that the First Amendment and retaliatory issues involved need not be determined in order to dispose of the state court litigation, applying the "essential elements" test of *Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983).

The Court of Appeals likewise disposed of the All Writs jurisdiction appeal summarily, in a footnote declaring it would not reverse the District Court's exercise of discretion, but providing no reasons. (Slip Op., App. A at 6a-7a, n.4).

Subsequent to the District Court's remand order, petitions for stay having been denied, proceedings have continued in the state court.

Conduct of the case pursuant to Pennsylvania law and practice in the County Court illustrates the considerations regarding removal. Without reasons, that court denied motions to dismiss. Respondent Commissioners were allowed by the state court to require that the petitioner trustees appear for expedited depositions until complete. They have subjected the three African American Trustees to nine (9) depositions thus far (in addition to three (3) depositions in the federal civil rights case), and seek more. Using as a springboard, the *New York Times v. Sullivan*, 376 U.S. 254 (1964) requirement that they prove recklessness, the commissioners have broadly alleged and widely explored the decision-making processes of the petitioner trustees in filing the federal civil rights action, and also explored trustees' personal biographies, *e.g.*, inadmissible investigation material in a settled case against petitioner Trustee Glanton.[4] They alleged in the Complaint that a petitioner trustee

4. There is presently pending a motion to obtain access to the settlement agreement of that case (which had been tried to a verdict awarding no damages for sexual harassment, but damages for retaliation, and then settled), to explore investigative reports commissioned by the plaintiff accuser in that case, which investigated other relationships of the petitioner and others.

was guilty of having an "unquenchable desire for fame, fortune and even sexual favors" (Complaint, ¶ 2).[5] They have thus pursued their stated objective to "pain him" and "stop" him from "using the race card" by explicating such matters without limitation (Reply Br. at pp. 11-12). In turn, despite their claim that the cases are not interrelated, all the discovery material has been used by them to defend the federal action. In addition to these vast exploratory excursions, they have continually referred to petitioner trustee Glanton on the record of his and the other petitioner trustees depositions as "Richard" over continued objections. Remonstrances to counsel to avoid such characterizations as resonant of historical intentional diminutives as a badge of inferiority were disregarded.

Even the nature of the case has been variously represented. Respondent commissioners have freely recast their characterizations to avoid apparently unforeseen First Amendment and equal civil rights pitfalls. For example, their Complaint commences by identifying them as "Plaintiffs, Commissioners of The Township of Lower Merion".

When these initial allegations proved disadvantageous, they disavowed their Complaint, stating that they are suing in their "individual capacity" and not "as public officials". (Apee. Br. at p. 26). When discovery revealed that at least some expenses of the suit are being borne by the local government, they simply asserted that the deposition transcripts are being made available to their Township (in the civil rights case). Yet, in contrast, in asserting that the newspaper comments were understood as referring to them despite the lack of identification of the sources of racism, the Commissioners have relied on the fact that since the Barnes was complaining about health and welfare, and since they as the Commissioners are responsible for health and welfare, therefore the public would understand that they were the objects of the alleged defamatory remarks (Br. Opposing P.O.'s, App. E at p. 57a). Similarly, despite clear allegations in the Complaint that the federal

5. The county court denied the Motion to Strike these allegations as irrelevant, scandalous and immaterial.

case is part of the alleged "smear campaign", in order to neutralize the retaliation issue, they have simply denied that fact. (Apee. Br., p. 11, 25). They have even alleged the Barnes' federal suit was filed in January as advance "insulation" against their March suit. (*Id.* at 36). The evident pretextual nature of these claims, and the relevance of pretext to prove motive, though briefed and argued, was not explicitly addressed by the Third Circuit.

STATEMENT OF FACTS

The context of the alleged smear campaign is a series of events and statements alleged in the Barnes' federal suit, which was incorporated in this case as part of the petitioners' Answer and New Matter. In the Summer of 1995, the Barnes Foundation was completing a two year rehabilitation of its Lower Merion gallery building, at a cost of some $12 million.[6] The building had been closed during that period. (NM ¶ 9-46). The Barnes had operated the gallery building for art education and visitation for some 70 years, making it a vested right use under the zoning laws. (NM ¶ 9-79).

No on site parking existed, and parking on the street had been the practice for decades. (NM ¶ 9-98).

With the rehabilitation, the Barnes had planned to increase the accessibility of its collection to the public. (NM ¶ 9-29, 49). The Township commissioner representing the area had been urging the Barnes to adopt an offsite parking system with shuttle buses, to add to compatibility with the community. The Barnes had been reviewing such options, but by September 1995, the Barnes had been unable to find any offsite source, and therefore had indicated its intention to build an onsite parking lot, which it believed (and was later determined) to be within its zoning rights (NM ¶ 9-98). The area Commissioner and the neighbors then commenced to

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6. Petitioners' New Matter ¶ 9 incorporating Barnes Amended Federal Complaint (hereinafter "NM ¶ 9"), paragraph 46.

attempt to prevent the Barnes from reopening (NM ¶ 9-105). Concurrently, the Township started imposing new and excessive inspections and requirements on the Barnes to complete the renovation to its satisfaction. (NM ¶ 9-113-122, 131-135).

As the impasse occurred, by November 10, the Township began to openly demand that the Barnes not reopen at all. The Barnes saw that the unusual demands being imposed on it were different from those imposed on white institutions, including neighbors which entail massive parking and were not subjected to the same stringent inspections. (NM ¶ 9-138-156). When the Township "warned" the Barnes that it would strictly enforce its ordinances, the Barnes expressed concern that it was being subjected to discrimination. The Township never responded directly, but the following week, on November 15, 1995, at a public meeting, the respondent-commissioners adopted a formal Resolution which called upon the Barnes to postpone the reopening "indefinitely" and threatened it with "any and all appropriate actions necessary to maintain the peace, safety and quality of life of the surrounding neighborhood and its residents", if it reopened. (NM ¶ 9-105, 112, reprinted as App. G, pp. 97a-99a). The meeting was attended by a number of the Barnes' neighbors, who spoke of "carpetbaggers", "Mr. Glanton and his people", and "outsiders", and the Township promised full cooperation with the neighbors, referring to fears of crime and violence. (NM ¶ 9-104-110, *also see* App. G, 87a).

After the resolution was adopted, an interview appeared in The Philadelphia Inquirer. It traced the history of the Barnes' relationship to the community, both neighbors and Township, and reported the decades-long friction about racial issues. The Barnes President was quoted as speaking of "thinly disguised racism" in the treatment the Barnes was receiving. (Exhibit to Complaint, reprinted as App. F, pp. 64a-70a).

While the respondent Commissioners assert that the remarks related to them (App. E at 57a), the Barnes' President, petitioner Glanton, answered that the remarks were addressed to the overall

situation. (Answer ¶¶ 44-45). The Common Pleas Court Judge, has, indeed, opined that petitioner Glanton, may or may not have been referring to respondent, in ordering that the newspaper reporter's deposition be taken. (Opinion of December 4, 1996). (The newspaper has appealed that Order to the Superior Court of Pennsylvania, where it is now pending).

The Barnes did reopen, and shortly thereafter, in December 1995, the Township issued a "violation notice" to the Barnes, asserting that it had become a different use as a result of increased visitation, requiring that the Barnes invoke an appellate procedure to defend itself.

Eight months later, after several hearings and briefing, the Township withdrew the violation notice, in order to forestall a Zoning Board decision, then about to be issued. (These and the following facts are reported in pending zoning cases in the county court). It then substituted a new violation notice charging the same violations. The new charge relied on increased visitation which occurred in June-August 1996 as an unusual departure because the Barnes had joined its facility to those of the Philadelphia Museum of Art for a special one time Cezanne exhibit, thus temporarily inflating the Barnes' visitation. Subsequently, after hearings on the new alleged violation, the Township Zoning Board agreed with the Township government and the matter is now on appeal in the County Court. Despite the pending appeal, the Township has moved for a restraining order and $500 per day fines, alleging that the Barnes is continuing to exceed a 500 person, 2 1/2 day per week ceiling that the Township contends is its maximum visitation right.

In the meantime, the Township also required that the Barnes go through a Zoning Board proceeding to obtain special permission for the parking lot (NM ¶ 9-99). The procedures the Township has imposed for the parking lot, which the suit alleges are discriminatory, are still holding up permits for the parking lot, some eighteen months later.

In the federal suit, the Township and the Commissioners filed

an Abuse of Process Counterclaim. The neighbors were dismissed by the District Court on the basis that their actions were privileged under the *Noerr-Pennington* Doctrine. Summary Judgment Motions are now pending, filed by the Barnes on the Abuse of Process counterclaim, and by the Township and Commissioners on the main claim.

REASONS FOR GRANTING THE WRIT

I.

CLARIFICATION OF THE SCOPE OF SECTION 1443(1) REMOVAL IS NEEDED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND WITH THE PRINCIPLES OF THIS COURT AS TO REMOVABILITY *TO PROTECT THE PURPOSE OF EQUAL CIVIL RIGHTS STATUTES.*

In an era of new equilibrium in civil rights jurisprudence, effective enforcement of anti-bias legislation and open dialogue on the issues is critical. Yet the Third Circuit's holding is that "technical precepts" require allowance of practical "stopping" of that dialogue. This decision of the Third Circuit conflicts with *Conrad v. Robinson*, 871 F.2d 612 (6th Cir. 1989), and with the analysis and policies reflected in *Sofarelli v. Pinellas County*, 931 F.2d 718 (11th Cir. 1991) and *Whatley v. City of Vidalia*, 399 F.2d 521 (5th Cir. 1968). The Eleventh and Fifth Circuits likewise allowed removal under Section 1443(1) to prevent retaliatory or suppressive state court proceedings based on the same circumstances as enforceable under related federal equal civil rights statutes.

It also conflicts with the important principles recognized in many decisions of this Court, interpreting anti-retaliation provisions broadly to secure the rights protected by the statute as a whole, *e.g.*, *Robinson v. Shell Oil Co.*, __ U.S. __, 117 S. Ct. 843 (1997); *Mitchell v. Robert DeMario Jewelry Inc.*, 361 U.S. 288 (1960).

As stated succinctly in *Robinson*:

> We hold that the term "employees", as used in § 704(a) of Title VII, is ambiguous as to whether it includes former employees. *It being more consistent with the broader context of Title VII and the primary purpose of § 704(a), (we hold that former employees are included within § 704(a)'s coverage.)*

(Emphasis added) (117 S. Ct. at 849).

Indeed, this Court has been vigilant to prevent retaliatory acts that impact on federally guaranteed rights. In the context of a National Labor Relations Board investigation, the protection afforded a complaining employee "has been a liberal one in order fully to effectuate the section's remedial purpose". *National Labor Relations Board v. Scrivener*, 405 U.S. 117 (1972), *reh'g denied*, 405 U.S. 1033 (1972).

As in *Robinson*, the statutory language (here, Section 1443(1)) is ambiguous as applied. In allowing removal where the claimant "is denied or cannot enforce . . . a right under any law providing for the equal civil rights of citizens . . . or of all persons", the statute clearly permits several interpretations.[7] Accordingly, this Court enunciated a test in *Rachel v. Georgia*, 384 U.S. 780 (1966) and *Greenwood v. Peacock*, 384 U.S. 808 (1966), which balanced the damages from disruption of state criminal law processes against the then proliferating civil rights legislation. Now, the current cases raise an issue new to Section 1443, how Section 1443(1) applies to state civil suits which preempt, or suppress pre-pending, Section 1985(3) federal equal civil rights cases.

Rachel-Peacock did not foreclose, and indeed its analysis supports, Section 1443 removal where retaliation for a federal suit is involved, and a state rule of law such as that of *MacElree v.*

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7. *See* generally Amsterdam, "Criminal Prosecutions affecting Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial", 113 *U. Pa. Rev.* 793, at 851-874; (1965).

Philadelphia Newspapers, Inc., 647 A.2d 1050 (Pa. 1996) impedes protection of equal civil rights free expression. The Court of Appeals made no analysis to consider *Rachel-Peacock* in this context. It did not even allude to *MacElree*.

By analyzing the case simply as common law tort, *i.e.*, strictly by category, ignoring the effect of *MacElree*, and by refusing to consider its acknowledged retaliatory interrelationship to the federal suit previously filed to seek redress for the very violations of their civil rights based on race whose assertion is the basis of the common law suit, the decision of the Third Circuit opens the door to the evisceration of equal federal civil rights through preemptory and debilitating state court retaliatory proceedings, going well beyond the issues in *Rachel-Peacock*.

This application of Section 1443(1) to Section 1985(3) conflicts with the strong policy enunciated by this Court to interpret statutes to protect against destruction of their purpose. For example, although *Robinson v. Shell Oil Co.* dealt with statutorily specified retaliation language (in Title VII of the Employment Act of 1968, 42 U.S.C. § 2000(e)), this Court's decision expressed the Court's general concern to interpret the language to protect the effectiveness of the statutory scheme.

Applying this policy in a Section 1443(1) case, in *Conrad v. Robinson, supra*, the Sixth Circuit balanced disturbing the plaintiff's choice of a state court in which to prosecute a common law action, against the policies of the Act. The Sixth Circuit, in contrast to the Third Circuit, interpreted the retaliatory state court case as removable under Section 1443, notwithstanding that it was purportedly non-retaliatory, and that the removant could have defended the case in the state court.

While the language of Section 1985(3) is different from that of the statutes involved in *Conrad* and *Sofarelli*, like them, Section 1985(3) protects against conspiracies "for the purpose of depriving, *directly or indirectly*," persons of equal protection. As stated in this

Court in *Robinson*, the threat of repression is to "deprive" by defeating the purpose of the statute as a whole.

This result is not only not required by Section 1443, but is contrary to the very history of it and Section 1985(3). As set forth in the 1866 debate on Section 1443, quoted in Amsterdam, *supra*, Section 1443 was intended to protect the civil rights laws then at issue from being lost by trials in the local courts (113 U. Pa. L. Rev. at 813, 817-18).

Section 1985(3) was one of these laws. It was originally enacted as part of the Act of 1871 (Act of April 20, 1871, Ch. 22 S.2, 17 Stat. 13) (App. D, 42a) to focus on equal civil rights, a previous Civil War conspiracy statute. (Act of July 31, 1861, Ch. 33, 12 Stat. 284). (App. D, 38a). As adopted in 1871, Section 1985(3) explicitly and specifically included removal by incorporation of the "Provisions of the Act of April 9, 1866" (App. D, 45a). The 1866 Civil Rights Act contained its own civil rights removal provision. It was the initial version of what is now codified in Section 1443.[8] It was reenacted in 1870 as the Civil Rights Act of 1870, (Ch. 114, Sec. 18, 16 Stat. 144). The enforcement sentence in the Section 1985 predecessor (Act of 1871) (Appendix D), which had incorporated the 1866 removal provision, was later codified separately as Section 641 of the Revised Statutes, which has been held to not have intended substantive change, (*E.g.*, *Rachel*, 384 U.S. at 789-791) and is now merged in Section 1443.

This incorporated language, *i.e.*, of Section 3 of the Act of 1866, thus incorporated in what is now Section 1443, is thus the very removal concept of Section 1443(1). It was itself unqualified because it was applied only to equal civil rights retaliation for seeking equal civil rights:

> If any suit or prosecution, civil or criminal,

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8. Act of April 9, 1966, Sec. 3; Ch. 31, 14 Stat. 27, entitled "An Act to Protect all Persons in the United States in their Civil Rights and *to Furnish a Means of Other Vindication.*" (App. D, 39a-41a) (emphasis added).

> has been or shall be commenced in any State court, against any . . . person, for any . . . wrongs done or committed by virtue or under color of authority derived from this act . . . such defendant shall have the right to remove such cause for trial to the proper district or circuit court.

(App. D, 4a).

Thus, in contrast to the 1960's statutes at issue in *Rachel* and *Peacock*, what is now Section 1443 and what is now Section 1985(3) were part of a contemporaneous scheme which was intended to prevent conspiratorial violations of federally protected civil rights based on race, and which allowed for removal of suits designed to punish for assertion of equal civil rights. Codification of two civil rights sections suggests that the codification is not read to restrict federal court jurisdiction. *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, Puerto Rico*, 426 U.S. 572, 583 (1976).

Section 1985 is thus historically akin to anti-retaliatory provisions in Title VII and other litigation statutes, in containing an anti-retaliatory provision, *i.e.*, removal. It is a statute creating an original and removal jurisdiction for retaliatory conduct. As such, it is significantly different from the marching at issue in *Peacock* and similar to the public accommodation conduct at issue in *Rachel*. Moreover, both of those cases arose from self-help actions, and the decision to allow removal of state prosecutions arising out of self-help involved no pre-existing Federal Court litigation.

Where, unlike *Rachel* and *Peacock*, there is a pre-pending federal civil suit, and the state suit is one also implicating First Amendment pure speech, (not action), allowing removal would not in any way defeat the federalism concerns, nor the criminal law disruption concerns, at issue in *Peacock* and its successor *Johnson v. Mississippi*, 421 U.S. 213 (1975).

While the Third Circuit did not express dissatisfaction with the *Peacock-Rachel* rule, it clearly felt bound to mechanically apply its two prong test to this situation, and this may have deterred the Third Circuit from such a statutory analysis. It is for this Court to explicate the meaning of Section 1443 where an equal civil rights action is filed in Federal Court, and a "slap" action is then filed in state court.

The Court of Appeals result is actually inconsistent with the intention of *Rachel* and *Peacock*. In *Rachel* and *Peacock*, the Court developed a demarcation between the considerations of federalism associated with removal of criminal prosecution, as against the considerations of completing the liberation of African American slaves after the Civil War. The line developed in *Rachel* and *Peacock* reflects the Court's concern that African Americans acting clearly within the peaceful, nonconfrontational, non-physical, confines of clearly permissible means to achieve a self-help result, are entitled to be free from stale infringement of that right by persecution through prosecution. The Court of Appeals result, technical as it professedly is, defeats that purpose and consistency requires correction by this Court.

Although this result might be achievable through the All Writs Act, or an interpretation of Section 1441, the more specific vehicle for providing narrowly crafted relief for the retaliation against litigation scenario is Section 1443. Under Section 1443(1), there would be less uncertainty, and more limited application. Complementing the *Peacock-Rachel* rule, an appropriate interpretation of Section 1443(1) would be achieved, consistent with this Court's general civil rights jurisprudence.

II.

THE IMPORTANCE OF THE ISSUE REQUIRES THIS COURT'S ACTION.

Denial of Section 1985(3) removal raises a deeply troubling specter of practical deterrence of Congressionally long-authorized

actions under the Civil War Era Civil Rights Acts, through retaliatory suits. This Court has had numerous occasion to reiterate the importance of deterring retaliation, most recently in *Robinson v. Shell Oil Company, supra.* Contrary to this basic policy, the decision herein would permit, whether through excessive modesty, or deference, the wholesale cancellation of the right under the Federal Civil Rights Acts to federal court determination, with all the panoply of federal protections, of federal jury pools, and federal appellate review as of right, of civil rights actions which were expressly allowed in the federal courts because of problems in the state courts. As shown herein, denial can essentially destroy the protected right by debilitating broad based attacks.

Denial thereby essentially also conflict with the critical concern expressed in *New York Times v. Sullivan*, 376 U.S. 254 and its progeny, to protect speech about public officials; a policy which has led to procedures designed to prevent runaway verdicts against unpopular speakers. This conjoinder of Section 1985(3) and the First Amendment threats urgently requires protective assertion.

Requiring that judge, not jury, determine actionability of governmental libel, this Court has explained that a jury's application of standards to determine the reliance of a defamatory statement "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those vehement caustic and sometimes unpleasantly sharp attacks, *New York Times v. Sullivan*, which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Company v. Roy*, 401 U.S. 265, 277 (1971).

Our nation is in the process of developing a new equilibrium of the values of fair treatment, federalism, and tolerance. The threat to this equilibrium of the distortion involved here is a clear one. Giving such a blank check to local officials, who elect the judges and people their juries with local citizens, an option to preempt already pending federal suits through such slap litigation, would represent a severe inhibition on the ability of protected minority

classes to vindicate the rights accorded to them by Congress, pursuant to the Fourteenth Amendment and the related Constitutional values under the First Amendment. It would substantially undermine the courts' ability to insure against retaliation for the assertion of rights, a threat not only to the integrity of the statutory purposes, but also to the processes and substance of the courts themselves.

The allegedly defamatory statements herein were printed in a national publication, as asserted in the Complaint, and thus subject the petitioners themselves to different rules, depending on the place of suit. (Exhibit B of Complaint incorporated therein). Alternatively, Section 1441 or Section 1651 removal should be available where the actions stem from the same facts and are suffused with allegations of racial bias. Whatever the remedy, the courts should not be forced into insensitivity. This Court should exercise its oversight responsibility to determine which remedy is available. To protect the Congressional allocation of jurisdiction from erosion by retaliation, removal is required. While in this instance, the Commissioners as a virtual unit, and therefore local government in substance, are proceeding against the federal civil rights plaintiff, the Third Circuit's conclusion opens the door to all well placed, and strategically aggressive civil rights defendants, to similarly seek to "stop" and "to pain" such persons, for addressing these issues through pure speech (Reply Br., pp. 11-12). The result would be, as the Commissioners have vividly stated, that dialogue on the issues will be "stopped", unless the civil rights advocates are able, both financially, and legally, to prove their comments about government officials. In this way, not only would civil rights enforcement be negated, but the dialogue on the problems, which is both protected by the First Amendment (*Sullivan)* and so necessary to the resolution of the problems, would be stifled.

Moreover, confusing overlapping litigation has already proliferated confusion and prejudice. The plaintiffs have sought in the state court to limit discovery by the petitioner African American Trustees, based on rulings of the District Court in the Section 1985/

1983 case. For example, after the District Court ruled that general discrimination by the respondent commissioners was not relevant, the respondents are attempting to persuade the state court that that decision controls discovery in this libel case. Despite the fact that *New York Times v. Sullivan* creates a broader area of relevance (*e.g.*, reasonable perception of truthfulness, absence of recklessness), while the Federal action involves proof of actual discrimination, the defendant commissioners have sought to apply the federal court limitation in the state court case.

There is the potential for the federal Section 1985 action to be precluded in whole or in part by a prior trial of the state court action. Pennsylvania res judicata and collateral estoppel law, which may apply, may affect the prior Section 1985 (and 1983) claims in the Federal Court.

In fact, the respondent commissioners herein are presently appearing in the local court to secure an expedited trial. If successful, they, the respondent commissioners, will have the benefit of a jury pool in Montgomery County, Pennsylvania which is far less diverse than the jury pool for the Eastern District of Pennsylvania. This is not the "luck of the draw," but rather an advantage gained through retaliatory action.

In addition to the prospect of uneven judicial results, the mere necessity to try the two cases separately, and possibly have a void trial would be a tremendous imposition multiplying the inhibitory suppressive effect on First Amendment and Equal Protection activities, indeed, perpetuating and enhancing the Section 1985 conspiracy. Section 1443, 1441 and 1651 all allow timely relief, and one or more should be sustained.

III.

CERTIORARI IS NECESSARY TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO APPEALABILITY OF NON-JURISDICTIONAL REMAND ORDERS.

Utilizing its standing practice which conflict with that of several other circuits, the Third Circuit held the merits of the federal question removal unreviewable because of 28 U.S.C. § 1447(d). (Slip Op., App. A, at 6a). The Third Circuit relied exclusively on its prior decision in *Commonwealth of Pennsylvania ex rel. Gittman v. Gittman*, 451 F.2d 155, 156 (3d Cir. 1971), stating flatly, "a decision on removal under § 1441 is not appealable under 28 U.S.C. §1447(d)."

Certiorari is needed to resolve a recurring and important conflict among the circuits on a matter of jurisdiction, a matter of special concern to this Court, as recognized *e.g.*, in *Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976). This will prevent disparate treatment of federal issues and impairment of federal court enforcement of state court SLAP actions, such as this case, by denying appellate review.

28 U.S.C. § 1447(d) states in pertinent part,

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . .

Despite this flat language, this Court twice reiterated during the 1995-1996 term, " '§ 1447(d) must be read *in pari materia* with § 1447(c), so that *only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d).*' " *Quackenbush*

v. Allstate Insurance Co., __ U.S. __, 116 S. Ct. 1712, 1718, 135 L. Ed. 2d 1 (1996).[9]

This Court in *Thermtron* reviewed a district court remand of a § 1441 removal case, holding the remand improper. Clearly, therefore, *Thermtron* teaches that contrary to the Third Circuit, not all § 1441 (federal question) removals are defined by § 1447(c) and are not immune from review under § 1447(d), as construed.

The only § 1447(c) ground for remand which could be at issue herein is "lack of subject matter jurisdiction," but it was not explicitly asserted by the District Court. The District Court's determination to remand *was based on* the discretionary rule of *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988).[10] It refused Section 1441 removal by rejecting the Petitioner Trustees' factual and legal claim that the state court action contains a necessary federal element because it is retaliatory and factually overlapping. It held *Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983) inapplicable. This conclusion is not a ruling that it lacks subject matter jurisdiction. Therefore, as Section 1447(d) is limited by this Court, it is not a Section 1447(c) jurisdictional

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9. *Quoting Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976); *Things Remembered Inc. v. Petrace*, __ U.S. __, 116 S. Ct. 494, 495, 133 L. Ed. 2d 461 (1995) (emphasis added).

10. This Court there held:

> [A] district court has discretion to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate. The discretion to remand enables district courts to deal with cases involving pendent claims in a manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine.

(484 U.S. at 357).

remand, and Section 1447(d) does not insulate the decision from appellate review.

In nevertheless refusing review, the Court of Appeals eliminated any distinction between a Section 1441 decision not to retain jurisdiction and a Section 1441 decision that there is no jurisdiction which could be retained. In equating a Section 1441 remand to an automatic appellate bar, the Third Circuit gives no deference to this Court's decisions.

The circuits are in conflict. While the Second, Fourth, Sixth and Eighth Circuits have similarly held that Section 1447 bars appellate review in similar cases, despite *Thermtron*, the First, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have taken a contrary approach. The cases agreeing with the Third Circuit include, *e.g.*, *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *Robertson v. Ball*, 534 F.2d 63 (5th Cir. 1976); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); *Zuniga v. Blue Cross and Blue Shield of Michigan*, 52 F.3d 1395, 1399-1400 (6th Cir. 1995) (§ 1447 a "seemingly ironclad bar to review — no matter how the appeal is fashioned" even of explicitly discretionary remand); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1343 (6th Cir. 1993); *Thornton v. Holloway*, 70 F.3d 522 (8th Cir. 1995); *Board of Managers of 2900 Ocean Avenue Condominium v. Bronkovic*, 83 F.3d 44 (2nd Cir. 1996).

The opposing circuits have sought to follow the thrust of *Thermtron/Things Remembered/Quackenbush*. They have reviewed remands except in clear cases in which remand was ordered pursuant to § 1447(c), because the removal was not authorized by Congress and the court was not authorized to assume jurisdiction, *i.e.*, for lack of subject matter jurisdiction. *Commonwealth of Massachusetts v. V & M Management, Inc.*, 929 F.2d 830 (1st Cir. 1991) (remand decision declining to exercise jurisdiction does not fall within § 1447(c) and is reviewable); *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996) (review of remand even though district court relied on § 1447(c) and expressly stated

that "there is no longer any basis for federal jurisdiction"); *In re Excel Corp.*, 106 F.3d 1197, 1200 (5th Cir. 1997); *Smith v. Texas Children's Hosp.*, 84 F.3d 152, 154 (5th Cir. 1996), *reh'g denied*, 95 F.2d 56 (1996) (appellate jurisdiction to review discretionary decision to remand pendent state law claims); *J.O. v. Alton Community Unit School District 11*, 909 F.2d 267, 270 (7th Cir. 1990); *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996) district court declined to exercise supplemental jurisdiction); *In re Life Insurance Co. of North America*, 857 F.2d 1190, 1193 (8th Cir. 1988); *Ferrari, Alvarez, Olsen & Ottoboni v. Home Insurance Co.*, 940 F.2d 550, 353 (9th Cir. 1991); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1180 (9th Cir. 1989)(remand order based on a substantive determination on the merits apart from any jurisdictional decision reviewable as a collateral order); *Clorox Co. v. United States District Court*, 779 F.2d 517, 520 (9th Cir. 1985) (remand order based on choice of venue clause of a contract is appealable); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984) (same); *SBKC Service Corp. v. 1111 Prospect Partners, L.P.*, 105 F.3d 578 (10th Cir. 1997) (following the Ninth Circuit); *Pacificare of Oklahoma, Inc. v. Burrage*, 59 F.3d 151, 153 (10th Cir. 1995) (remand based on a district court's perceived discretion is not a remand under § 1447(c)); *In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1257 (11th Cir. 1992) (discretionary decision to decline exercise of supplemental jurisdiction under 28 U.S.C. § 1367(c)(3) is not within § 1447(c) and is reviewable); *In re Federal Savings and Loan Ins. Corp.*, 837 F.2d 432, 436 (11th Cir. 1988) (limiting § 1447(d) application to cases removed pursuant only to § 1441(a) and remanded pursuant to § 1447(c)).

The Court of Appeals result herein is thus contrary both to the principle of established precedent of this Court, particularly *Thermtron* and its progeny, and reflects a widespread split in the circuits.

Consistent with *Thermtron, et al.*, and the majority of the circuits, this Court should resolve the conflict and hold that legal

insufficiency of a significant federal claim intertwined with a pending federal case does not go to the subject matter jurisdiction of a federal court, and therefore appeal is allowed. It should apply the term consistently so that the federal court lacks appellate jurisdiction, not when the court merely determines that the legal theory alleged is erroneous, or the facts do not compel a conclusion, but only when, as the term has been defined in Rule 12(b) cases, the right claimed is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation of New York State v. Oneida County*, 414 U.S. 661, 666 (1974).

Since "subject matter jurisdiction" has constitutional implications, and this Court has enunciated strict standards for finding that no subject matter jurisdiction exists to distinguish it from lack of a cause of action.

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that a failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. . . . The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statute clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned.

Bell v. Hood, 327 U.S. 678, 682-83 (1946). Under the standard rule, it is therefore assumed that when Congress enacted 28 U.S.C. § 1447(c) as amended in 1988, without specifying any

other definition of "subject matter jurisdiction", it adopted this Court's well-established definition of that term. *See e.g., National Labor Relations Board v. Town & Country Electric Inc.*, __ U.S. __, 116 S. Ct. 450, 455, 133 L. Ed. 2d 371 (1996). Moreover, Congress amended the Code by adding 28 U.S.C. § 1367 to specify that subject matter jurisdiction attaches in non-diversity cases, not just to claims involving federal questions, but also — where substantial federal issues are already before the court — to non-federal claims that arise from a common nucleus of operative facts such that one would ordinarily expect them to be tried together. (28 U.S.C. § 1367).

Thus, where the removal is based on Sections 1443 and 1651 as well as Section 1441, the Section 1441 action should not be construed as coextensive with lack of subject matter jurisdiction. The language of § 1447(c) leading to the appeal bar is "subject matter jurisdiction", while § 1441 is based on "original jurisdiction." A federal court can have subject matter jurisdiction even if it lacks original jurisdiction. *E.g., In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1257, n.4 (11th Cir. 1992).

It follows that the Section 1447 subject matter jurisdiction bar is not implicated where removal jurisdiction was also asserted under § 1443, even if removal is eventually rejected on *Rachel-Peacock* grounds. Jurisdiction is not the issue.

Accordingly, Section 1441 remand decisions should not be insulated from review by § 1447(d), at least where removal is in the context of a preexisting federal case. They should be reviewable in order to determine whether the removant must be subjected to a subsequently filed state court action which asserts, among the grounds for the action, the filing of the federal case.

This result is further supported by Constitutional considerations. If Section 1447 bars review by this Court of all discretionary § 1441 remand decisions, it creates the potential of violation of law as basic as that of *Marbury v. Madison*, 1 Cranch

137, 2 L. Ed. 60 (U.S. 180), by creating uncertainty as to the erosion of the Constitutional duty of this Court to administer the judicial power of the United States. Such Constitutional questions will be avoided, consistent with the policy of this Court, by interpreting Sections 1447(c) and (d) in a narrow manner, *i.e.*, to bar appellate review of remand decisions only where such remand decisions are based on a true lack of any power of the district court to retain jurisdiction. Such clear instances (*e.g.*, lack of diversity, lack of any colorable subject matter jurisdiction), represent more defensible contexts in which to deny review in deference to Section 1447(d), and the policy it reflects, without risking the ultimate power of this Court to review lower court decisions.

Especially where a case postdates a preexisting federal civil rights case, there is no reason to fear any wholesale abuse, such as motivated Section 1447(d). Furthermore, the appellate court, in such particularized circumstances, would not be overburdened with appeals, any more than its appellate jurisdiction to review the granting and denial of motions for preliminary injunctions, collateral orders, pursuant to *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), or qualified immunity cases, *e.g. Behrens v. Pelletier*, __ U.S. __, 116 S. Ct. 834 (1996), overburdens the appellate courts.

Indeed, in a case such as this one, involving a slap-back suit for defamation where the state case alleges the filing of the federal civil rights action and speech allegedly directed at public officials, review is required to prevent failure of the policies in *New York Times v. Sullivan*; *i.e.*, expression should not be inhibited. Just as special quasi-immunity procedures, *e.g.*, judge's determination of libel, are made available, *See Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), *reh'g denied*, 467 U.S. 1267 (1984); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); the availability of an appeal from a remand of a slap suit seeking to suppress pure civil rights speech is required.

The Court of Appeals of course did not decide the availability of § 1441 removal. However, it can be readily determined on the

record presented. The District Court had acknowledged but dismissed the retaliatory nature of this case, (Slip Op., App. B at 27a), stating, "the state court action cannot be reviewed solely as a retaliatory measure for bringing the federal claim, but is an independent defamation action in its own right." Likewise, it held the fact that the state court suit could result in relief in the federal case does not "necessitate" that the actions be joined. (*Id.* at n.8).

This result was clearly in error. Indeed, the Court of Appeals acknowledged that the cases stem from the same facts and "suffuse the litigation, which is anchored in federal court," allowing the inference that it might have reached a different result had it reviewed the Section 1441 remand. Under these circumstances — where the conduct complained of was initiation of a federal civil action and related pure speech subject to the protective rules of *New York Times v. Sullivan*, in view of the importance of protecting the First Amendment right to criticize government and government officials, and in view of the federal issue of retaliation for seeking Section 1985 relief, and of the silencing of equal protection oriented First Amendment speech — it is clear that the federal rights are totally intertwined with the alleged defamation, and meet the test for removal.

Accordingly, contrary to the District Court, as set forth in *Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983) removal for "joinder" is essential, and this Court can reverse the § 1441 decision without the necessity for remand to the Circuit Court. In the alternative, of course, this Court could remand to the Circuit Court for its determination.

In either event, where denial of equal protection and First Amendment values and suppression of Section 1985 remedies is indubitably involved in the state court slap-back action, there is every reason to regard issues as within the subject matter jurisdiction for appeal, and therefore no reason to treat the appeal as barred pursuant to Sections 1447(c) and (d).

Such a rule would allow for this Court to discharge its appropriate responsibility under the Constitution, and resolve the conflict to provide appellate review of remand where there are issues which are within federal subject matter jurisdiction.

Likewise, it is necessary that this issue be taken up at this time, as the denial of appealability — a rare instance of the attempted elimination of the supervisory power of the appellate federal courts, combined with the Section 1443 denial — will allow a proliferation of slap-back actions against egregious Section 1985 violations without an opportunity to have the issue decided by this Court until after the litigation has sapped the speaker of assets and time. First Amendment and Equal Protection policies alike require timely vindication.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Third Circuit should be granted.

Respectfully submitted,

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June 30, 1997

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 3, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-1299

KENNETH E. DAVIS; JAMES S. ETTELSON; ALAN C. KESSLER; FRANK LUTZ; JOSEPH M. MANKO; ORA R. PIERCE; JAMES J. PRENDERGAST; BRIAN D. ROSENTHAL; DAVID A. SONENSHEIN; HOWARD L. WEST; GLORIA P. WOLEK; PHYLLIS L. ZEMBLE

v.

RICHARD GLANTON, Individually and as a Trustee of The Barnes Foundation; NIARA SUDARKASA, Individually and as a Trustee of The Barnes Foundation; SHIRLEY A. JACKSON, Individually and as a Trustee of The Barnes Foundation; CHARLES FRANK, Individually and as a Trustee of the Barnes Foundation

Richard Glanton Niara Sudarkasa and Shirley A. Jackson, Appellants

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 96-cv-01800)

Argued: January 30, 1997

Appendix A

Before: BECKER, ROTH, *Circuit Judges*, and BARRY, *District Judge.**

OPINION OF THE COURT

BECKER, *Circuit Judge*,

This is an appeal by certain trustees of the Barnes Foundation, who are also African-American citizens. It requires us to determine whether a state court defamation action filed against them by certain commissioners of Lower Merion Township, alleging that the Trustees had falsely accused the Commissioners of racist official conduct, is removable to federal district court pursuant to the civil rights removal statute, 28 U.S.C. § 1443(1), on the ground that the defamation action represents an attempt to retaliate against the Trustees for exercising their federally protected right to assert, in a federal lawsuit, that they were discriminated against by the Commissioners on racial grounds. Although the Trustees present an emotionally appealing argument for removal, we conclude that they have failed to satisfy the narrow and well-defined requirements for § 1443(1) removal as explicated in *State of Georgia v. Rachel*, 384 U.S. 780 (1966), and *City of Greenwood v. Peacock*, 384 U.S. 808 (1966). We will therefore affirm the order of the district court remanding the removed action to the state court from whence it came.

I. Facts & Procedural History

The Barnes Foundation is a non-profit Pennsylvania corporation located on Latches Lane, Lower Merion Township, Montgomery County, Pennsylvania. Its history is well known,

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* Honorable Maryanne Trump Barry, United States District Judge for the District of New Jersey, sitting by designation.

and for present purposes we need recount only that the late Dr. Albert C. Barnes created the Barnes Foundation, by Indenture and Agreement dated December 6, 1922, and that the Indenture provides that, following the expiration of the terms of the Foundation's Trustees in place at Barnes' death, four of the five Foundation Trustees are to be nominated by Lincoln University, a historically African-American institution, with a fifth trustee to be named by Girard Bank (now Mellon Bank). By 1990, with the death or resignation of a number of former trustees, the Foundation's Board of Trustees became predominantly African-American. At the time of the acts complained of, Richard Glanton, Niara Sudarkasa, Shirley Jackson, and Charles Frank (defendants in the state defamation action) were trustees, and all except for Mr. Frank are African-American and appellants here.[1]

For present purposes, the material elements of this Lower Merion Township-Barnes Foundation dispute began on January 18, 1996, when the Foundation filed an action under 42 U.S.C. § 1983 and § 1985(3). claiming that the Township, the members of the Township Board of Commissioners, and certain of the Foundation's Latches Lane neighbors had conspired to harass, intimidate, interfere with, and discriminate against the Foundation.[2] The federal civil rights complaint alleges that the

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1. The Commissioners filed a voluntary notice of dismissal without prejudice of Trustee Frank on June 13, 1996.

2. The district court, by order dated June 3, 1996, dismissed the complaint as to the neighbors on the grounds that, even assuming that they had participated In a conspiracy to violate the Foundation's constitutional rights and were motivated by invidious racial animus, they enjoyed total immunity under the *Noerr-Pennington* doctrine. *See Barnes Foundation v. Township of Lower Merion*, No. 96-0372. The Trustees do not appeal this order.

Township and the Commissioners, in concert with the neighbors, imposed parking, police, fire, and zoning requirements and regulations in such a way as to injure the Foundation and interfere with its use of its property, and that they enforced these requirements and regulations against the Foundation more aggressively than they did against other similarly situated institutions.

The gravamen of the Foundation's federal civil rights action is that this adverse treatment was motivated by racial prejudice engendered by the fact that (1) the majority of the Foundation's Trustees are African-American; (2) Glanton, the President of the Board, is African-American; and (3) the Foundation is controlled by a historically African-American university. The complaint alleges that the Township and the Commissioners violated the Foundation's constitutional rights, and that they should be enjoined from continuing such violations.

On March 4, 1996, the Commissioners filed a state court defamation action in the Court of Common Pleas of Montgomery County against Glanton and the other members of the Foundation's Board. The state court defamation action is based upon two sets of allegedly defamatory statements: (1) certain statements attributed to Glanton in a *Philadelphia Inquirer* article dated November 27, 1995, that the Commissioners had engaged in "thinly disguised racism," and that "[t]here is no way that you cannot see racism in the way [the Commissioners] are treating the Foundation": and (2) statements made in the Barnes Foundation's complaint in the federal civil rights action.

On March 7, 1996, the Trustees filed a Joint Notice of Removal, claiming that federal removal jurisdiction existed

pursuant to 28 U.S.C. §§ 1441, 1443(1), and 1651.[3] The Trustees contend that the defamation suit represents an attempt by the Commissioners to retaliate against the Trustees for exercising their federally protected rights. Indeed, the Trustees assert that the very filing of the defamation action violates their civil rights, and, at all events, that the Foundation and the Trustees will be denied their right to be free from unconstitutional race discrimination if the Commissioners are permitted to proceed in state court.

The Commissioners quickly filed a motion to remand, contesting all three grounds for removal. The district court granted the Commissioners' motion, determining that removal was improper on all of the grounds asserted by the Trustees. Addressing the requirements of § 1443(1), the district court held that the Trustees have never demonstrated that they would be unable "to protect their rights" in state court as required by *Georgia v. Rachel*, 384 U.S. 780 (1966), and *City of Greenwood v. Peacock*, 384 U.S. 808 (1966). The district court also held that removal pursuant to § 1441 was improper because the Trustees had failed to show that federal law was an essential element of the Commissioners' state court defamation action. In so holding, the court ruled that the state action "cannot be viewed as a retaliatory measure for bringing the federal claim, but is an independent defamation action in its own right."

Finally, the district court found that the state court

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3. On March 7, 1996, the Foundation also amended its complaint in the federal civil rights action to allege that the filing of the defamation action and the imposition on the Trustees of the obligation to defend it were taken to further the alleged conspiracy to harass the Foundation in violation of § 1983 and § 1985(3). The amended complaint also asserts that the institution of the suit violates the Foundation s First Amendment rights.

defamation action was not removable under § 1651, better known as the All Writs Act, because the Trustees did not meet "their threshold burden of demonstrating the 'extraordinary circumstances' that would justify removal under the Act." On April 3, the Trustees filed a Notice of Appeal from the District Court's order.

II. Appellate Jurisdiction

Our power to review a remand order is defined by 28 U.S.C. § 1447(d), which provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Section 1447(d) thus expressly authorizes appellate review of remand orders in cases that were originally removed to federal court under § 1443. However, it follows from the clear text of § 1447(d) that, insofar as the Trustees' appeal challenges the district court's rulings under 28 U.S.C. § 1441, we must dismiss the appeal for want of appellate jurisdiction. We so held in *Gittman v. Gittman*, 451 F.2d 155, 156 (3d Cir. 1971) (recognizing the non-appealability of decisions on removal, even when a removal decision pursuant to § 1443 is appealable in the same case). We will accordingly dismiss the appeal insofar as it is predicated on § 1441.[4]

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4. The Trustees also invoke our mandamus jurisdiction under the All (Cont'd)

Appendix A

III. Removal Under 28 U.S.C. § 1443

A. Introduction: *State of Georgia v. Rachel* and *City of Greenwood v. Peacock*

The Civil Rights Removal Statute, 28 U.S.C. § 1443, authorizes the removal of a state law action:

> [a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof.

While the language of this section is opaque, the jurisprudence has made clear that Congress has crafted only a narrow exception to the rule that a state court action may be removed to a federal district court only if federal jurisdiction is evident on the face of the plaintiff's well-pleaded complaint (which, of course, it is not in this state defamation action).

In *State of Georgia v. Rachel*, 384 U.S. 780 (1966), the

(Cont'd)
Writs Act, 28 U.S.C. § 1651. A district court in exceptional circumstances, may use its authority under the Act to remove an otherwise unremovable state court action to "prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977). Here, however, the Trustees have not demonstrated how removal will support jurisdiction that is already in existence. Nor have they identified the "extraordinary circumstances" necessary to justify removal under the Act. *See In re Agent Orange* Product Liability Litig., 996 F.2d 1425, 1431 (2d Cir. 1993) (The Act is not a Jurisdictional blank check which [federal courts] may use whenever they deem it advisable."). Accordingly neither will we exercise jurisdiction under § 1651.

Appendix A

Supreme Court articulated the precise circumstances required to sustain removal under § 1443(1), clarifying that removal requires satisfaction of a two-pronged test: a state court defendant must demonstrate both (1) that he is being deprived of rights guaranteed by a federal law "providing for . . . equal civil rights"; and (2) that he is " 'denied or cannot enforce' that right in the courts" of the state. *Id.* at 788. In *Rachel*, twenty African-American individuals were prosecuted in state court for criminal trespass violations as a result of their attempts to obtain service at a privately owned restaurant in Atlanta, Georgia. In contrast, federal law required such a restaurant to serve persons of all races, thus immunizing the conduct for which they were being prosecuted. The arrested individuals sought to remove the state court prosecutions to federal court on the basis of 28 U.S.C. § 1443(1). In construing the first requirement, the Court determined that "the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality." *Id.* at 792. The Court concluded that the statute invoked by the removing defendants, the Civil Rights Act of 1964, was a statute providing for equal civil rights.

The Court then addressed the second statutory requirement — that the state court defendant be "denied or cannot enforce" his or her rights in state court. The Court noted that, in order for pre-trial removal to be sustained, denial of rights traditionally had been required to be so manifest in a formal expression of state law that "it could be taken as suitable indication that all courts in that State would disregard the federal right of equality with which the state enactment was precisely in conflict." *Id.* at 804 (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880), and *Commonwealth of Virginia v. Rives*, 100 U.S. 313 (1880)). The Court explained that, given the particular circumstances of that

case, a firm prediction that a defendant would be denied federal rights in the state court might be made even in the absence of a discriminatory state enactment.

In creating a narrow exception to the traditional "denied or cannot enforce" interpretation, the *Rachel* Court recognized that § 203 of the Civil Rights Act of 1964 specifically prohibited any "punishment or attempts to punish" any person for exercising rights secured by other sections of the Act. *Id.* In fact, the Court noted that in *Hamm v. City of Rock Hill*, 379 U.S. 306, 311 (1964), it had interpreted § 203 of the Civil Rights Act of 1964 to prohibit "on its face . . . prosecution of any person for seeking service in a covered establishment, because of his race or color." *Rachel*, 384 U.S. at 785. Based on the prohibition against prosecution contained in § 203, the Court concluded that "nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are Immunized from prosecution." *Id.* Accordingly, the Court opined that "*in the narrow circumstances of this case, any proceedings in the courts of the States* will constitute a denial of the rights conferred by the Civil Rights Act of 1964 as construed in *Hamm*." *Id.* at 804 (emphasis added).

In *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), decided on the same day as *Rachel*, the Court highlighted the limited nature of the *Rachel* exception. In *Peacock*, twenty-nine people were prosecuted as a result of First Amendment petitioning activity. The Mississippi state court defendants sought removal under § 1443(1). The *Peacock* Court began its analysis of § 1443(1) removability by noting the unique circumstances present in *Rachel*:

> the basic difference between this case and

> *Rachel* is thus immediately apparent. In *Rachel,* the defendants relied on the specific provisions of a pre-emptive federal civil rights law — §§ 201(a) and 203(c) of the Civil Rights Act of 1964 . . . as construed in *Hamm v. City of Rock Hill, supra* — that . . . specifically and uniquely conferred upon the defendants an absolute right to "violate" the explicit terms of the state criminal trespass law with . . . impunity.

Id. at 826. Accordingly, the Court explained that two significant differences existed between *Peacock* and *Rachel.* First, "no federal law confers an absolute right on private citizens . . . to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman"; and, second, "no federal law confers immunity from state prosecution on such charges." *Id.* at 826-27.

Peacock should not be read to narrow the holding of *Rachel.* Instead, the Court merely reiterated the limited and unique circumstances under which removability could be sustained regardless of the presence of a facially discriminatory state statute. Thus, *Peacock* reaffirms that in the vast majority of cases:

> [i]t is *not* enough to support removal under § 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The

> motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the Judges of the federal courts to put their brethren of the state Judiciary on trial. Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

Id. at 827-28. As a result, the Court in *Peacock* refused to expand *Rachel's* interpretation of § 1443(1), holding that its earlier "decisions were correct in their basic conclusion that the provisions of § 1443(1) do not operate to work a wholesale dislocation of the historic relationship between the state and the federal courts in the administration of the . . . law." *Id.* at 831.

B. The First Prong of *Georgia v. Rachel*

The Trustees assert that their case satisfies both requirements for § 1443(1) removability as set forth in *Rachel* and interpreted in *Peacock* While they invoke 42 U.S.C.

§ 1985(3) with respect to both prongs, in terms of the first prong, they contend that the filing of the state court defamation action was an act in furtherance of a racially motivated conspiracy to deny them their equal civil rights.[5] The Trustees point out that § 1985(3) was designed to redress injuries that result from a conspiracy motivated by race-based animus, and submit, therefore, that they have invoked the protection of an "equal civil rights" statute as required by the Court in *Rachel.*

Intuitively, § 1985 would seem to constitute an "equal civil rights" statute. It surely provides a cause of action for one who has been the victim of conspiratorial racial discrimination, and hence denied the "equal protection of the laws." Furthermore,

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5. 42 U.S.C. § 1985(3) provides:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws: or if two or more persons conspire to prevent by force, intimidation, or threat, any Citizen who is lawfully entitled to vote, . . . ; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

its origins rest in the Klu Klux Klan Act of 1871, an Act passed exclusively to redress civil rights violations motivated by racial prejudice. *See Griffin v. Breckenridge*, 403 U.S. 88, 98 (1971) (Ku Klux Klan Act of 1871 "is the parent of § 1985(3)").

It is not clear, however, that § 1985(3) satisfies the technical nature of the Court's jurisprudence in this area. In fact, *Rachel* and *Peacock* suggest that a state court defendant must invoke a statute that expressly provides for equal rights stated specifically in terms of racial equality. *Peacock*, 384 U.S. at 828. The one circuit to have considered § 1985(3) in the context of § 1443(1) removal affirmed the remand order of the district court, and stated, without exposition, that the district court had "properly followed *Rachel*." *Doe v. Berry*, 967 F.2d 1255, 1256 (8th Cir. 1992). In contrast, courts that have granted removal under § 1443(1) addressed claims brought under civil rights statutes that specifically protected civil rights based on *racial* equality. *See Conrad v. Robinson*, 871 F.2d 612, 615 (6th Cir. 1989) (holding that the first prong was satisfied where defendant claimed protection, under 42 U.S.C. § 2000e-3, from retaliation for engaging in activity protected by 42 U.S.C. § 2000e-2(c), which forbids limiting union membership on account of "race, color, religion, sex, or national origin"); *Sofarelli v. Pinellas County*, 931 F.2d 718, 721 (11th Cir. 1991) (first prong satisfied where defendant asserted protection under the Fair Housing Act, which prohibits discrimination in housing "on the basis of race").

Even if § 1985(3) is deemed to protect specifically against race-based discrimination as the *Rachel* Court required, the Commissioners contend that the Trustees' claim must falter on an altogether different ground. They submit that, in actuality, the Trustees are using the vehicle of a § 1985 claim to protect their First Amendment rights. That is not an implausible

contention, and, were it to be the case, the Trustees' removal action would be improper, for the Supreme Court has held that "the First Amendment rights of free expression . . . are not rights arising under a law providing for 'equal civil rights' within the meaning of § 1443(1)." *Peacock*, 384 U.S. at 825. However, more than asserting that the filing of the state defamation action violates their First Amendment rights, the Trustees contend that the Commissioners filed the defamation action in direct retaliation for the filing of a federal civil rights action alleging racial discrimination in violation of federal law.

The status of § 1985(3) as an "equal civil rights" statute is thus unclear, with strong arguments on both sides in terms of the jurisprudence. Fortunately, however, we need not reach this close and difficult issue because we conclude for reasons described herein, that the Trustees have failed to satisfy the second *Rachel* prong.

C. The Second Prong of *Georgia v. Rachel*

In order to sustain removability under § 1443(1), a defendant must also demonstrate that he is "denied or cannot enforce" his specified federal rights in the state courts. *Rachel*, 384 U.S. at 788. Although traditionally the denial had to be manifest in a "formal expression of state law," a defendant can now sustain pre-trial removal where a federal civil rights statute "[o]n its face . . . prohibits prosecution of any person" seeking to exercise that civil right. *Id.* at 804 (citing *Hamm*, 379 U.S. at 311). Thus, removal is available where the state court defendant's federal civil rights would "inevitably be denied by the very act" of being brought to trial in state court. *Peacock*, 384 U.S. at 828. In creating such a narrow range of cases that are susceptible to removal, the Supreme Court sought to ensure that "removal

would be available only in cases where the predicted denial [of equal civil rights] appeared with relative clarity prior to trial." *Rachel,* 384 U.S. at 803. For if the denial was less clear, the federal courts would become "involved in the unseemly process of prejudging their brethren of the state courts." *Id.*

The Trustees assert that the mere pendency of the state court defamation action violates their federal civil rights as prescribed in § 1985(3). They emphasize that the Commissioners filed their defamation action soon after the Trustees filed the federal civil rights action, and as such the state action can be viewed only as a means to intimidate and retaliate against the Trustees for pursuing their federal action. They contend that § 1985(3), like the sections of the Civil Rights Act of 1964 at issue in *Rachel,* prohibits actions to intimidate or punish persons for exercising civil rights protected by § 1985(3). Furthermore, they argue that attempts to punish, even if unsuccessful, deny and violate the very rights provided by that provision.

A careful reading of § 1985(3) makes clear, however, that the provision grants no such protection. It does not confer an absolute right on private citizens to defame others. Nor does it confer immunity from state civil actions brought to seek redress for those statements. Furthermore, the Trustees do not attempt to demonstrate, and apparently cannot demonstrate, that a state law exists that would on its face deny them the ability to enforce their equal rights in state court.

The Trustees nonetheless claim that, just as *Hamm v. City of Rock Hill* immunized state court defendants from prosecution for trespass, *Griffin v. Breckenridge,* 403 U.S. 88 (1971), held that § 1985(3) immunizes the Trustees from a defamation action. They submit that the Court in *Griffin* explained that § 1985(3)

"protects against 'intimidation,' which must include threats of civil and criminal prosecution against African-Americans exercising First Amendment rights," and, therefore, that § 1985(3) protects the Trustees from a defamation action. But *Griffin* cannot be read to extend protection to the Trustees for several reasons. First, the Court in *Hamm* relied on language that expressly protected against prosecution, in that § 203 of the Civil Rights Act provided that "[n]o person shall . . . punish or attempt to punish any person" for exercising any right protected under the Act. *Hamm*, 379 U.S. at 311. No such language exists in § 1985(3). In fact, the only place in this statute which specifically refers to "intimidation" is related to the right to vote. Thus, a perusal of § 1985(3) makes clear that it does not provide the Trustees with a right to engage in tortious, defamatory conduct. Second, the Trustees misread *Griffin*, for nowhere in it does the Court intimate that § 1985(3) prohibits the prosecution of a state court defamation action.

In sum, it is clear that nothing in § 1985(3) or in *Griffin* immunizes the Trustees from civil state court defamation actions, and that they fail to fit within the limited exception set forth in *Rachel*. In fact, the circumstances of the Trustees' case are closer in appearance to *Peacock* than to *Rachel*. The distinction between these two types of cases is clear:

> The line between *Rachel* and *Peacock* is that between "prosecutions in which the conduct necessary to constitute the state offense is specifically protected by a federal equal rights statute under the circumstances alleged by the petitioner, and prosecutions where the only grounds for removal is that the charge is false and motivated by a desire to

> discourage the petitioner from exercising or to penalize him for having exercised a federal right."

Johnson v. Mississippi, 421 U.S. 213, 234 (1975) (Marshall, J., dissenting) (citing *New York v. Davis*, 411 F.2d 750 (2d Cir. 1969)). Even if the Trustees are correct in their assertions concerning the Commissioners' retaliatory motivation, their case clearly falls into the latter category, and as such, outside the narrow exception identified in *Rachel*. Moreover, removal is not warranted by the concern, *simpliciter*, that a denial of equal rights may take place and go uncorrected at trial. *Rachel*, 384 U.S. at 800. An analysis of that sort would require this Court to second-guess the impartiality of our state court brethren, and this outcome is exactly what the court in *Rachel* and *Peacock* counseled against.

None of the cases on which the Trustees rely persuades us to hold otherwise. *See Sofarelli*, 931 F.2d 718; *Whatley v. City of Vidalia*, 399 F.2d 521 (5th Cir. 1968); *Rogers v. Rucker*, 835 F.Supp. 1410 (N.D. Ga. 1993); *Northside Realty Assoc., Inc. v. Chapman*, 411 F. Supp. 1195 (N.D. Ga 1976). *Whatley is* not apposite because the removing defendants in that case specifically invoked the provisions of the Voting Rights Act of 1965, which provides that "[n]o person shall intimidate, threaten or coerce . . . any person for urging or aiding any person to vote or attempt to vote." *Id.* at 522 n.2 (citing 42 U.S.C. § 1973i(b)). Thus, because Congress had specifically immunized the action in question, the state court defendants could not be prosecuted for encouraging individuals to vote.

The cases of *Sofarelli*, *Rogers*, and *Northside Realty* are similarly unhelpful. In those cases, the removing state court

defendants invoked a provision of the Fair Housing Act of 1968 which provides that no person shall "coerce, intimidate, threaten, or interfere with any other person . . . on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted" by the Fair Housing Act. *Northside Realty*, 411 F. Supp. at 1198 (citing 42 U.S.C. § 3617). Thus, no person who had encouraged another to take advantage of the Fair Housing Act could be prosecuted, and the filing of the suit itself violated the removing defendants' civil rights. As previously discussed, the Trustees cannot avail themselves of such a provision, for § 1985(3) does not immunize them from a civil defamation suit.

In addition, the Trustees cannot derive support from *Conrad v. Robinson*, 871 F.2d 612 (6th Cir. 1989). In that case, the removing defendant Robinson filed a Title VII action against Conrad, and a newspaper article was subsequently published that discussed the pending case. Conrad, based on the statements in the newspaper article and in Robinson's complaint, brought a libel action against him. In upholding § 1443(1) removal, the Sixth Circuit noted that the "only statements made by Robinson" which Conrad claimed were libelous "related to Robinson's [preexisting] federal court suit." As a result, the Sixth Circuit opined that the "connection between Robinson's speech and this protected activity [the filing of the suit] is very close. . . . Had Robinson's comments in the Plain Dealer been unrelated to his pre-existing federal court case against [the union], but were just general allegations that Conrad discriminated on the basis of race, the result might be very different." *Id.* at 616.

We need not pass on whether we will follow *Conrad* because the question addressed by the Sixth Circuit is not the same as the one we now face. In *Conrad*, the removing defendant alleged

that the state court prosecution was not permitted because Title VII prohibited any form of retaliation against an employee for having filed charges of discrimination in employment. *Id.* at 615 (citing 42 U.S.C. § 2000e-3). Title VII contains an explicit proscription against discrimination against any employee because "he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). The *Conrad* court determined that the filing of the defamation suit was in retaliation for the filing of action under Title VII. In the present case, the Trustees have not cited to a specific federal law that prohibits retaliation against, or provides immunity for, their allegedly defamatory conduct.

We are not insensitive to the point so effectively made by the Trustees' able counsel that the events that form the basis of the state court defamation action stem from the same set of facts as those underlying the federal civil rights action, and that, since allegations of racial bias suffuse the litigation, which is anchored in federal court, the defamation action too must be heard there in order to assure that civil rights are not compromised. But this view ignores the rigors of federalism, and the technical precepts of governing by dint of which the principles of federalism are translated into reality.

IV. Conclusion

The second prong of *Georgia v. Rachel* has not been met, Just as the district court concluded; therefore, the order of the district court remanding this case to the Court of Common Pleas of Montgomery County (PA) will be affirmed.

Appendix A

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED APRIL 3, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-1800

KENNETH DAVIS, *et. al.*

Plaintiff,

v.

RICHARD GLANTON, *et. al.*

Defendants.

MEMORANDUM and ORDER

Brody, J. April 1, 1996

The issue before me is whether a defamation action originally filed in state court can be removed to this Court, based on the fact that the issues presented in the defamation action are tangentially related to facts presented in a § 1983 action already pending in this Court. I find that removal on this basis is improper, and I therefore grant plaintiff's Motion to Remand.

I. BACKGROUND

On January 18, 1996, the Barnes Foundation filed an action

under § 1983 and § 1985(3), alleging that the Township of Lower Merion, the Township Board of Commissioners, individual Commissioners and various neighbors ("the federal defendants") acted in concert to harass, intimidate, interfere with and discriminate against the Barnes Foundation. The Complaint alleges that the federal defendants were motivated by racial bias and personal animus, and that their actions violated the Barnes Foundation's constitutional rights.[1]

On March 4, 1996, certain federal defendants (namely, several of the Township Commissioners) brought a defamation action in Montgomery County Court of Common Pleas against certain Trustees of the Barnes Foundation. The defendant Trustees removed the defamation action to this Court on March 7, 1996 under three separate provisions: (a) 28 U.S.C. § 1443(1) (b) 28 U.S.C. § 1441 and (c) 28 U.S.C. § 1651. In response, plaintiffs in the defamation action filed a Motion for Remand contesting all three grounds for removal. Reply papers were submitted by both sides, and then oral argument was held on March 29, 1996.

II. 28 U.S.C. § 1443(1)

The first ground for removal cited by defendants, 28 U.S.C. § 1443(1), states in pertinent part: "Any of the following civil actions . . . may be removed . . . : (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof". 28 U.S.C. § 1443(1).[2] In their removal petition,

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1. An Amended Complaint was filed on March 7, 1996.

2. Note that this statute is rarely used as authority for removal. See e.g. *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1966), citing *Georgia v. Rachel*, 384 U.S. 780 (1966).

defendants argue that they "are being subjected to civil rights violations based upon the race of certain of the Trustee defendants and the action filed by plaintiffs is itself an act by which their civil rights have been violated". Joint Notice of Removal at ¶4. Defendants further state that the state court is an inadequate forum to redress this claim. See *id.*

In order to remove a case under § 1443(1), a two-part standard must be met. First, a person must be deprived of a specific federal right pertaining to racial equality that is protected through a federal statute. See *City of Greenwood v. Peacock*, 384 U.S. at 825-26; *Georgia v. Rachel*, 384 U.S. at 791-92. Therefore, § 1443(1) removal is unavailable for claims based solely on violations of the 1st or 14th amendment.[3] See *Johnson v. Mississippi*, 421 U.S. 213, 219 (1975); *City of Greenwood v. Peacock*, 384 U.S. at 825-26.

Secondly, the person must show that he or she will be deprived of this right in state court, either due to the existence of a state constitution or statute mandating discrimination, or alternatively because the adjudication of the claim in state court would *inherently* violate federal law. See *Johnson v. Mississippi*, 421 U.S. at 219 (discussing second prong); *City of Greenwood v. Peacock*, 384 U.S. at 827-28 (narrowing the Court's previous interpretation of the second prong in *Georgia v. Rachel*[4]); see generally *Kentucky v. Powers*, 201 U.S. 1, 31-33 (1906); *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 308-11

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3. Defendants' claims in oral argument that violations of their first amendment rights should serve as a basis for removal are thus irrelevant for purposes of § 1443(1).

4. Defendants here incorrectly rely on the broader *Georgia v. Rachel* standard. See infra.

(1879); *Virginia v. Rives*, 100 U.S. (10 Otto) 313, 319-20 (1879). Without meeting this two-prong standard, removal under § 1443(1) is improper.

Defendants argue that they satisfy the first prong by citing specific federal statutes pertaining to race discrimination, namely § 1983 and § 1985(3). I will not dwell on the merits of this first argument, due to the fact that defendants have clearly failed to satisfy the second prong of the test.

With regard to the second prong, defendants never identify a specific state law or specific article in the Pennsylvania Constitution which would prevent the safeguarding of their federal rights. Alternatively, defendants never demonstrate why the Pennsylvania courts would not be able to adequately protect their rights. In the removal petition, defendants simply state "Trustee defendants' rights will be denied or cannot be enforced in the state court", but never adequately develop this claim in their papers or at oral argument. See Joint Notice of Removal at ¶4.

In making their arguments, defendants rely mainly on the broad holding of *Georgia v. Rachel*[5], and fail to recognize that

5. In *Georgia v. Rachel*, twenty defendants were prosecuted in state court for criminal trespass as a result of their attempts to obtain service at a privately owned restaurant (open to the general public) in Atlanta, Georgia. The Supreme Court allowed removal, finding that (1) there was a specific federal statute safeguarding defendants' rights, namely Title II of the Civil Rights Act of 1964 which prohibited discrimination in places of public accommodation (including restaurants) and (2) prosecution in state court would be inherently unconstitutional, since "any proceedings in the courts of the State will constitute a denial of the rights conferred by the Civil Rights Act of 1964." *Georgia v. Rachel*, 384 U.S. at 804. The Court thus broadly (Cont'd)

the holding in *Georgia v. Rachel* was significantly narrowed by the Court's decision in *City of Greenwood v. Peacock*[6]. Defendants never address the impact of the *City of Greenwood v. Peacock* decision in their papers or in their rebuttal at oral argument, tacitly conceding that they were unable to meet the standard for § 1443(1) removal as identified in *City of Greenwood v. Peacock* and its progeny.

Because defendants' fail to meet the standard for § 1443(1) removal, I find that § 1443(1) is not an appropriate basis for removal of the state law defamation action.

III. 28 U.S.C. § 1441

Defendants also remove this case on § 1441 grounds. In order for a case to be properly removed under § 1441, a federal

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(Cont'd)
interpreted the second prong of the test, finding that an "equally firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights in state court" is enough to satisfy the second prong. See *id.*

6. In *City of Greenwood v. Peacock*, twenty-nine defendants were prosecuted for engaging in civil rights activity in Mississippi. The Supreme Court did not allow defendants to remove to federal court under § 1443(1), claiming that (1) defendants had failed to articulate a specific federal statute protecting their right to protest, and general civil rights statutes were not sufficient to satisfy this requirement (2) and that, as a result, the prosecution in state court was appropriate, since it would not *inherently* violate federal law. See *City of Greenwood v. Peacock*, 384 U.S. at 825-34. The Court thus considerably narrowed the second prong of the test by raising the threshold of proof for removal. The Court articulated certain policy considerations for their reexamination of the second prong, including its desire to prevent "the judges of the federal courts ... [from] put[ting] their brethren of the state judiciary on trial." *Id.*, at 828.

court must have original jurisdiction over the claim. See 28 U.S.C. § 1441. Because there is no federal question on the face of the state court complaint, defendants must demonstrate that federal law is an essential element of the state case. See *Franchise Tax Bd. of the State of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8-11 (1983) (if complaint does not assert federal cause of action, removal is still appropriate if substantial, disputed question of federal law is a necessary element of one of the state claims).

Defendants argue that federal law is an essential element of the defamation action "because it arises under 42 U.S.C. § 1983, by reason of being a retaliatory action designed to deter Barnes' federal civil rights action". Joint Notice of Removal at ¶6. In their second set of papers, defendants argue that this case also "arises under" 42 U.S.C. 1985(3). See Defendants' Opposition to Plaintiffs' Motion to Remand at 10-11.

However, defendants never satisfactorily demonstrate how the state court defamation action, which will be resolved according to Pennsylvania tort law on defamation, depends on an analysis of federal law.[7] The mere fact that race is an element of the alleged defamatory remarks does not render this suit dependent in any way on § 1983 or § 1985(3) analysis. Indeed, unlike the cases cited by the defendants, the defamation claim here can be resolved without any reference to, or analysis of, a federal statute. Compare *Food Lion Inc. v. United Food & Commercial Workers Int'l Union*, No. 6:93-0582-1AJ, 1993 U.S. Dist. LEXIS 14669 at *6 (D.S.C. July 21, 1993) (ERISA is essential element of claim); *Sweeney v. Abramovitz*, 449 F.

7. Although there may be some common factfinding, the standards for proving a federal suit based on § 1983 and § 1985(3), and a common law defamation suit, are completely different.

Supp. 213, 215-16 (D. Conn. 1978) (in malicious prosecution case, analysis of grounds of § 1983 claim is essential element of proving whether there was probable cause for bringing the § 1983 claim). In the case at bar, determining the truth or falsity of the alleged defamatory statement does not depend on interpreting § 1983 or any other statute. Therefore, defendants here fail to satisfy the *Franchise Tax Bd.* "necessary element" standard discussed above. See *Franchise Tax Bd. of the State of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8-11 (1983).

Finally, the crux of the state action complaint stems from statements published in the Philadelphia Inquirer regarding plaintiffs' dishonesty in office (due to "thinly disguised racism"), and therefore the state action cannot be viewed solely as a retaliatory measure for bringing the federal claim, but is an independent defamation action in its own right.[8]

I therefore find that this action fails to "arise under" federal § 1983 and § 1985 statutes, and find removal under § 1441 improper.

IV. ALL WRITS ACT, 28 U.S.C. § 1651

The third ground for removal cited in the removal petition is the All Writs Act, which states in pertinent part, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective

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8. Although defendants may be able to use the filing of the state court action as an element of damages in the federal civil rights action, the fact that the Amended Complaint makes reference to the state court action does not, in itself, necessitate that the two actions be joined for purposes of adjudicating the federal claims.

jurisdictions and agreeable to the usages and principles of law". 28 U.S.C. § 1651(a). In their removal petition, defendants argue that the All Writs Act "provides an additional source of removal authority in exceptional circumstances such as this, where government officials are attempting to frustrate the proper administration of justice . . . and there is the potential for conflicting judgments with respect to whether or not the government officials have taken action against Barnes for illegitimate motives, including invidious racial discrimination". Joint Notice of Removal at ¶7. Defendants further argue that § 1651 has been "frequently invoked . . . in cases such as this, where state court proceedings are being used to interfere with the orderly administration of federal jurisdiction." Defendants' opposition to Plaintiffs' Motion to Remand at 14.

I find that defendants have not met their threshold burden in demonstrating the "extraordinary circumstances" that would justify removal under the All Writs Act in this case. See e.g. *Pennsylvania Bureau of Corrections v. United States Marshals Serv.*, 474 U.S. 24, 43 (1985) (courts should rarely exercise § 1651 authority). I further find that defendants have not adequately demonstrated how remanding this action to state court will interfere with the "orderly administration of federal jurisdiction", or how a ruling in state court on whether or not plaintiffs were defamed would conflict with a federal ruling on the § 1983 claims of the Barnes Foundation.

For these reasons, I find that the All Writs Act is an inappropriate basis for removal of the state law action.

V. CONCLUSION

The three grounds for removal offered by defendants' in

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their Joint Notice of Removal are insufficient, and I therefore order the following:

ORDER

AND NOW, this 1st day of April, 1996, for the reasons stated in the Memorandum accompanying this Order, IT IS ORDERED that plaintiff's Motion to Remand is GRANTED.

s/ Anita B. Brody
ANITA B. BRODY, J.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 1, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-1299

KENNETH E. DAVIS; JAMES S. ETTELSON; ALAN C. KESSLER; FRANK LUTZ; JOSEPH M. MANKO; ORA B. PIERCE; JAMES J. PRENDERGAST; BRIAN D. ROSENTHAL; DAVID A. SONENSHEIN; HOWARD L. WEST; GLORIA P. WOLEK; PHYLLIS L. ZEMBLE

v.

RICHARD GLANTON, Individually and as a Trustee of The Barnes Foundation; NIARA SUDARKASA, Individually and as a Trustee of The Barnes Foundation; SHIRLEY A. JACKSON, Individually and as a Trustee of The Barnes Foundation; CHARLES FRANK, Individually and as a Trustee of the Barnes Foundation

Richard Glanton, Niara Sudarkasa and Shirley A. Jackson, Appellants
(D.C. Civ. No. 96-cv-01800)

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, *Circuit Judges*.

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been

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submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

s/ James R. Becker
Circuit Judge

DATED: APR 1 1997

APPENDIX D — RELEVANT STATUTES

28 U.S.C. § 1441

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where

such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

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28 U.S.C. § 1443

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

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Appendix D

28 U.S.C. § 1447

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the moving party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter

jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

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28 U.S.C. § 1651

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

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42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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Appendix D

42 U.S.C. § 1985

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory,

with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

* * *

Appendix D

12 Stat. 284

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CHAP. XXXIII. — *An Act to define and punish certain Conspiracies.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force, the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States; or by force, or intimidation, or threat to prevent any person from accepting or holding any office, or trust, or place of confidence, under the Unites States; each and every person so offending shall be guilty of a high crime, and upon conviction thereof in any district or circuit court of the United States, having jurisdiction thereof, or district or supreme court of any Territory of the United States having jurisdiction thereof, shall be punished by a fine not less than five hundred dollars and not more than five thousand dollars; or by imprisonment, with or without hard labor, as the court shall determine, for a period not less than six months nor greater than six years, or by both such fine and imprisonment.

APPROVED, July 31, 1861.

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Appendix D

14 Stat. 27

CHAP. XXXI — *An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

SEC. 2. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is

prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

SEC. 3. *And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions

necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

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16 Stat. 144

CHAP. CXIV. — *An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes.*

* * *

SEC. 18. *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

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17 Stat. 13

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CHAP. XXII — *An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

SEC. 2. That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the

government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any

manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal,

review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

* * *

Revised Statutes of 1874

TITLE XXIV.

CIVIL RIGHTS.

SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. [See § 858.]

SEC. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by

the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [See §§ 563, 629.]

SEC. 1980. First. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

* * *

Appendix D

Revised Statutes of 1874

CHAPTER FOUR.

CRIMES AGAINST JUSTICE.

* * *

SEC. 5406. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror, each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment. [See §§ 1980-1981.]

SEC. 5407. If two or more persons in any State or Territory conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws, each of such persons shall be punished by a fine of

not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment. [See §§ 1977-1991, 2004-2010, 3306-3310.]

* * *

Revised Statutes of 1874

CHAPTER SEVEN.

CRIMES AGAINST THE ELECTIVE FRANCHISE AND CIVIL RIGHTS OF CITIZENS.

* * *

SEC. 5518. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment. [See § 5407.]

Appendix D

SEC. 5519. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment. [See § 5336.]

* * *

Revised Statutes of 1874

CHAPTER SEVEN

CIRCUIT COURT — JURISDICTION.

* * *

SEC. 641. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs,

made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in this case. If such copies are filed by said petitioner in the circuit court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the circuit court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate, under the seal of the circuit court, stating such failure, shall be given, and upon the

production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed. [See § 1977.]

* * *

APPENDIX E — EXCERPTS OF MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PRELIMINARY OBJECTIONS DATED JUNE 3, 1996

SPECTOR GADON & ROSEN, P.C.
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ATTORNEYS FOR PLAINTIFFS
Kenneth E. Davis, et al.

COURT OF COMMON PLEAS
MONTGOMERY COUNTY

NO. 96-03920

JURY TRIAL DEMANDED

KENNETH E. DAVIS, et al.,

Plaintiffs

v.

RICHARD GLANTON, et al.,

Defendants

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PRELIMINARY OBJECTIONS

Appendix E

I. INTRODUCTION

In support of their preliminary objections, Defendants have purposefully neglected to consider the appropriate standard of review in resolving those objections, and instead, have made arguments which are more appropriately made to a jury. Accepting all of Plaintiffs' factual allegations as true, under *MacElree v. Philadelphia Newspapers, Inc.*, __ Pa. __, __ A.2d __, 1996 Pa. LEXIS 789 (April 19, 1996) (Flaherty, J.), attached hereto as Exhibit A, it is clear that Plaintiffs have stated a cause of action for defamation. Consequently, this Court must overrule Defendants' Preliminary Objections and permit Plaintiffs to have their day in court to vindicate their reputations which were so callously, intentionally, and maliciously harmed by Defendants' defamation.

II. FACTUAL AND PROCEDURAL HISTORY

On March 4, 1996, Plaintiffs, certain individuals who are also Commissioners of the Township of Lower Merion,[1] filed this complaint claiming that Richard Glanton, a trustee and

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1. Defendants' attempts at misleading this Court into believing that this action is being pursued by the Commissioners of Lower Merion Township, or in other words by a government body, must be ignored. Plainly, if upon confronting one of the Commissioners on the street, Richard Glanton slapped him or her, certainly an action in tort would be available to that Commissioner, individually. Similarly, if the Commissioners were standing together in a group and Richard Glanton threw a handful of stones, injuring numerous Commissioners, there would be no doubt that each injured Commissioner, individually, would be able to pursue an action in tort to recover damages caused by the tortious conduct. The instant action in tort brought by certain individuals, who are also Commissioners, to recover for the injury done to their reputations is no different.

President of the Barnes Foundation's Board of Trustees, in conspiracy with certain other of the Barnes Foundation's trustees, defamed them by "maliciously and knowingly falsely and with wanton and careless disregard of the consequences of his conduct and the harm it would inflict, accused the plaintiffs of dishonesty in carrying out their civic duties in response to the parking, traffic and safety issues of the residents as nothing more than "thin[ly] disguised racism" for their failure to comply with his demands and asserted that "[t]here is no way you cannot see racism in the way they are treating the Barnes Foundation." (Plaintiffs' Complaint, at ¶ 43). Plaintiffs complain that these "[a]llegations of dishonesty in office through racism impute to them an unfitness to discharge their duties as Commissioners of the Township of Lower Merion," or in other words, accuse plaintiffs of misconduct in office. (Plaintiffs' Complaint, at ¶ 93). Such accusations constitute defamation per se. (Plaintiffs' Complaint, at ¶ 95).

After a month of refusing to yield to the jurisdiction of this Court, which included Defendants' improper removal and Defendants' improper attempts to mislead this Court into believing that their frivolous appeal of the remand order somehow precluded this Court from exercising its jurisdiction over this case, Defendants finally conceded to this Court's jurisdiction, and in doing so, filed Preliminary Objections to Plaintiffs' Complaint on April 12, 1996.[2]

Consistent with Plaintiffs' efforts to expedite trial in this case in order to vindicate Plaintiffs' reputations as soon as

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2. The only defendants filing Preliminary Objections to Plaintiffs' Complaint are Richard Glanton, Niara Sudarkasa and Shirley Jackson (collectively "Defendants"). Defendant Charles Frank has not filed any preliminary objections to Plaintiffs' Complaint.

possible,[3] Plaintiffs immediately followed that filing by filing Plaintiffs' Response in Opposition to Defendants' Preliminary Objections on April 19, 1996. Plaintiffs' also filed on that date a Praecipe for Argument. On May 20, Defendants filed their Memorandum of Law in Support of Preliminary Objections. In substantial part, Defendants' Memorandum of Law basically asks this Court to ignore our Supreme Court's most recent statement on the *inappropriateness of sustaining preliminary objections in defamation actions wherein accusations of dishonesty in office through racism constitute the complained of conduct.*

It is plain that Defendants' arguments are premature at this stage of the litigation, and as such, cannot support Defendants' Preliminary Objections. Accordingly, Defendants' Preliminary Objections must be overruled.

III. ARGUMENT

A. STANDARD OF REVIEW

It is well established in this Commonwealth that when reviewing preliminary objections, all well-pleaded facts are deemed to be admitted, as well as any and all inferences which are reasonably deducible from the allegations contained in the complaint. *Peerless Publications, Inc. v. County of Montgomery*, Pa. Commw. __ , 656 A.2d 547, *allocatur denied*, __ Pa. __, 668 A.2d 1141 (1995). Moreover, a court should only sustain the preliminary objections if the allegations of the Complaint are clearly insufficient to establish a plaintiff's right to relief.

---

3. *See* Plaintiffs' Motion For Expedited Trial Date, and as amended by Letter from Paul Rosen to Judge Tressler, dated May 22, 1996, attached hereto as Exhibit B.

HCB Contractors v. Liberty Place Hotel Assoc., 539 Pa. 395, 652 A.2d 1278 (1995). If any doubts exist with respect to whether the facts are sufficient, a court must give a plaintiff the benefit of the doubt and resolve those doubts in favor of overruling the objections. *National Check v. First Fidelity Bank*, 442 Pa. Super. 211, 658 A.2d 1375 (1995). Our Supreme . . .

* * *

jurisprudence that a plaintiff need not be specifically named in order to assert a cause of action for defamation; rather, an individual may state a cause of action in defamation if " 'pointed to by description or circumstances tending to identify him.' " *Schonek v. W.J.A.C., Inc.*, 436 Pa. 78, 83, 258 A.2d 504, 507 (1969) (citing *Cosgrove Studio and Camera Shop, Inc. v. Pane*, 408 Pa. 314, 319, 182 A.2d 751 (1962)).[8]

In this case, Defendants' Preliminary Objections must be overruled. The November 27, 1995, *Philadelphia Inquirer* article indicates early in the text that Dr. Barnes had problems dealing with the township commissioners, and that now, "*Glanton is having his own fights with the township*

8. Defendants' citation to *Alford-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 1969 (1995) is not relevant. *Alford-Polk* recognizes that when a plaintiff could not reasonably be connected to defamatory statements — perhaps because the group defamed is too numerous in number — an individual should not be able to assert a claim for defamation. Nevertheless, *Alford-Polk* specifically recognized our Supreme Court's holding in *Farrell* which stated that a township commissioner could assert a defamation claim because his or her constituents, or other readers, would know that he or she was one of the defamed Commissioners. Ironically, the Third Circuit noted that a group of township commissioners is a "well-defined group." *Alford v. Polk*, 37 F.3d at 1016.

government." The November 27, 1995, article digests Glanton's negative opinion of the Commissioners' handling of his October request for an on-site parking lot (that he would not put up with the Commissioners "jerk[ing him] around") and his criticism of the Commissioners' resolution adopted at the November 15, 1995 Board meeting. Thereafter, the article states that "Glanton argues that there is more to the current opposition than concern about art, traffic or pollution. It's an expression of a 'thinly disguised racism," and furthermore, that " '[t]here is no way you cannot see racism in the way they are treating the Barnes Foundation.' "

It is commonly and plainly understood that the elected officials of the township — the Lower Merion Township Commissioners — are the individuals charged with protecting the health, safety and welfare of their township, which includes concerns about traffic and pollution. Moreover, it is important to note that the language of the resolution adopted by the Lower Merion Township Commissioners on November 15, 1995, is specifically directed at taking "any and all appropriate actions necessary to maintain the peace, safety and quality of life of the surrounding neighborhood and its residents. . . ." Upon reviewing these statements in context of the article, it is clear that Glanton's defamatory statements were directed at the plaintiffs. As such, since a reasonable interpretation of the November 27, 1995, *Philadelphia Inquirer* article could be viewed as referring to the plaintiffs in this action, Defendants' Preliminary Objections must be overruled and the issue of whether the readers actually understood that the defamatory comments applied to plaintiffs is a question for the jury to determine. *See Zelik v. Daily News Publishing Co.*, 288 Pa. Super. 277, 283, 431 A.2d 1046, 1049 (1981) (" '[I]f the defamatory publication can reasonably be interpreted as referring

to a particular complainant whether recipients did so conclude is for a jury to determine.' "). *See also Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 180, 191 A.2d 662, 669 (1963) ("if one hurls defamatory epithets in a manner to strike one to whom they seem, because of fortuitous circumstances, peculiarly to fit, he is liable as much as if he had aimed his remarks precisely at that person.").

3. DEFENDANTS' PRELIMINARY OBJECTIONS MUST BE OVERRULED BECAUSE ACCUSATIONS OF DISHONESTY IN OFFICE THROUGH RACISM AMOUNT TO A CHARGE OF MISCONDUCT IN OFFICE

Defendants contend that their preliminary objections should be sustained because Richard Glanton's defamatory comments contained in the November 27, 1995, article are nothing other than statements of opinion. Notwithstanding Defendants contentions, it is clear that our Supreme Court recently addressed this area of the law.

In *MacElree v. Philadelphia Newspapers, Inc.*, the trial court granted the defendants preliminary objections, concluding that the characterization of MacElree as the "David Duke of Chester County" was nothing other than non-actionable "opinion." The Superior Court affirmed, declaring that "the remark, 'MacElree is the David Duke of Chester County' is semantically equivalent to saying, 'MacElree is racist.' " *MacElree v. Philadelphia Newspaper, Inc.*, 437 Pa. Super. 598, 603, 650 A.2d 1068, 1071 (1994). The Pennsylvania Supreme Court, however, did not agree.

Instead, our Supreme Court, recognizing the proper standard . . .

libelous?" *Id.* at 676. Based on its review of the available law, the Third Circuit stated that "[a]lthough the prediction is difficult, the available evidence leads us to the conclusion that the Pennsylvania Supreme Court would overturn the injunction against prospective libel issued by the district court against Thompson." *Id.* at 677.

In discussing the jury determination exception to the general common law principle that equity would not enjoin defamation, the Third Circuit had the following comment:

> Given the fear of judicial censorship that has pervaded this area of jurisprudence, and the almost talismanic significance that the case law attaches to the decisions of juries, we think it likely that, even if the Pennsylvania Supreme Court were willing to adopt this exception, it would do so only when there ***actually*** has been a jury determination regarding the libelous nature of the defendant's statements. (footnote omitted).

Kramer, 947 F.2d at 679.

Accordingly, Plaintiffs' request for an injunction, after a jury has cleared their reputations while they are still in office, is not a prior restraint in violation of the First Amendment. Defendants' Preliminary Objections must be overruled.

Appendix E

B. THE ALLEGATIONS CONTAINED IN PLAINTIFFS' COMPLAINT ARE NOT SCANDALOUS OR IMPERTINENT

Defendants assert that the bulk of the allegations in Plaintiffs' complaint are a scurrilous and reprehensible personal diatribe and vicious attack on Mr. Glanton, and for that reason, should be stricken from the complaint.[10]

Plaintiffs, however, as part of their proof in this matter, will be required to prove a certain requisite intent associated with the false statements, i.e., a reckless disregard for the consequences of the conduct, and as such, the Plaintiffs will be required to prove a history and pattern of wrongdoing by Richard Glanton, of which the other Trustees agreed to approve and support. Accordingly, Plaintiffs' complaint contains allegations that the defamatory statements "were made as part of a pattern, and with malice, with the direct intent to harm the reputations of plaintiffs," (¶ 88), "were made with wanton and reckless disregard of the consequences of his conduct, as part of a scheme and pattern to smear the good names of the plaintiffs, and as part of a pattern of maliciously false accusations

10. Defendants additionally ask this Court to dismiss the entire complaint on Defendants' opinion that the complaint was brought in bad faith, contrary to Pa.R.Civ.P. 1023 and 42 Pa.C.S. § 8351. Notwithstanding their bare contention, it is plain that based on the defamatory comments made by Richard Glanton, in conspiracy with certain other Trustees, that Commissioners' fundamental right to reputation could have been harmed, and in that regard, the Commissioners were fully within their right in bringing this defamation suit to seek recompense for the injuries that were intentionally and maliciously caused to their reputations. Defendants' improper and frivolous removal attempt and their even more frivolous appeal of Judge Brody's remand order in no way diminishes Plaintiffs' harm or their ability to seek redress under Pennsylvania state law.

perpetrated by Glanton against persons who stand in the way of his self-aggrandizement as President of the Barnes Foundation, his transparent efforts to ingratiate himself in "Society" and the international art world, and his unquenchable thirst for fortune and fame," (¶ 89), and that the defamatory statements were made with the full awareness and acquiensence of the other Trustees as part of a "smear campaign" to intentionally injure the plaintiffs' reputations. (¶¶ 96-99).

Plainly, the inclusion of the factual averments which reveal the history and pattern of wrongdoing is not "scandalous and impertinent matter" or a vicious attack on Mr. Glanton as suggested by Defendants, but instead, is a recitation of facts required for Plaintiffs' proof in this matter. Defendants, and particularly Defendant Glanton, after having specifically employed this improper pattern to smear the reputations of the Commissioners in order to extort and cower a settlement or favorable treatment from them, cannot now hide from his past and from his wrongful conduct — for that improper conduct now becomes the underpinnings of the explanation for his present tortious conduct against the Plaintiffs.

It is well settled that a court's ability to strike impertinent or scandalous matter from a complaint should be "sparingly exercised and [done so] only when a party can affirmatively show prejudice." *Commonwealth, Dept. of Environmental Resources v. Hartford Acc. & Indem. Co.*, 40 Pa. Commw. 133, 138, 396 A.2d 885, 888 (1979). In deciding whether factual averments constitute scandalous and impertinent matter, a court should be guided by the following definition: "To be scandalous and impertinent, a complaint's [factual] allegations must be immaterial and inappropriate to the proof of the cause of action." *Commonwealth Dept. of Environmental Resources v. Peggs Run*

Coal Co., 55 Pa. Commw. 312, 320, 423 A.2d 765, 769 (1980). It follows, therefore, that if the allegedly offensive material is essential to a plaintiff's complaint, the allegations are not scandalous and should not be stricken. *DeMeo v. Bullock*, 55 D. & C.2d 789 (1972). *See also Brennan v. Smith*, 6 Pa. Commw. 342, 299 A.2d 683 (1972) (when a plaintiff needs to show malice, embarrassing or offensive allegations will not be considered scandalous or impertinent.)

Consequently, it is plain that the factual averments complained of by Defendants were included in Plaintiffs' complaint in order to support Plaintiffs' contention that the defamatory statements were made with wanton and reckless disregard for the consequences of those actions, and further, to support Plaintiffs' contention that the other Trustees, with full knowledge of Mr. Glanton's predisposition to use the "race card" in order to demand compliance with his wishes, approved and ratified such improper conduct by joining into a conspiracy to make these defamatory statements in order to extort concessions from the Plaintiffs.

Plainly, while Defendants may have realized from the recitation of Mr. Glanton's past improper and unlawful conduct that such conduct is embarrassing, Defendants have not proved that they are prejudiced by the allegations. Since the allegations are, in fact, pertinent and material to Plaintiffs' cause of action, and since Defendants have not established how the averments work to prejudice them, Defendants' request to strike certain material from Plaintiffs' complaint must be denied. Defendants' Preliminary Objections must be overruled.

Appendix E

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Preliminary Objections.

Respectfully Submitted,

SPECTOR GADON & ROSEN, P.C.

s/ illegible
Paul R. Rosen, Esquire
Larry R. Wood, Jr., Esquire
Attorneys for Plaintiffs

Dated: 6/3/96

APPENDIX F — NEWSPAPER ARTICLE FROM *THE PHILADELPHIA INQUIRER* DATED NOVEMBER 27, 1995 (COMPUTER PRINT-OUT)

LASTING TENSION: IT'S A BARNES LEGACY THE FOUNDATION'S FOUNDER BATTLED OFFICIALS AND RESIDENTS. THE CURRENT DIRECTOR IS, TOO.
Philadelphia Inquirer (PI) — MONDAY November 27, 1995
By: Kyle York Spencer, INQUIRER CORRESPONDENT
Edition: WEST Section: NEIGHBORS Page: W01
Word Count: 1,392

TEXT:
MERION — Criticized for the way he displayed and presented the fabulous art collection in his care. Attacked as a bad neighbor. Called difficult to deal with; obnoxious; arrogant.

Richard H. Glanton, director of the Barnes Foundation, has heard it all. Dr. Albert C. Barnes who started the foundation, heard the same.

At least in that sense, the two men — Glanton, a politically connected lawyer, and Barnes, creator of one of the world's great art collections — have much in common.

Barnes got into some unpleasant fights with neighbors and local officials; Glanton is doing so now. And neighbors of the foundation have been called "mean-spirited," even racist, by both men.

So tension between the Barnes Foundation and the community surrounding it is nothing new.

On one occasion, according to the foundation's archives, Barnes challenged a Lower Merion Township commissioner

to "put up or shut up" about a promised action. On another, he was accused of insulting a commissioner as a "low-down politician."

He used to attack the commissioners for what he called "issue-dodging." When in 1927, a zoning ordinance was passed permitting development of "city homes" near his property, Barnes said the township commissioners were "double-crossing and betraying the people of Merion."

Barnes, who thought of himself as someone committed to "the advancement of the Negro race," threatened to place black students in several of the small houses made possible by the zoning change. Documents in the foundation archives indicate that Barnes believed this would be taken by the township fathers and his neighbors as the ultimate insult.

Glanton is having his own fights with the township government. In October, the commissioners did not go along with Glanton's request that approval of a new parking lot for the museum be expedited. Glanton responded by saying the tax-exempt foundation would no longer make voluntary payments in lieu of taxes for "those bureaucrats to jerk me around."

He has been assailed by neighbors such as Robert Marmon, who call him and the Barnes Foundation's board "interlopers," "outsiders" and "carpetbaggers." Those neighbors showed up at a Lower Merion Board of Commissioners meeting two weeks ago, on the eve of the museum's Nov. 16 reopening, complaining about fears of chaos, traffic, pollution and crowds.

The commissioners passed a symbolic resolution asking

the foundation to postpone the opening until it addressed the crowd-control issue. Glanton rejected the request, called it "disappointing," and criticized the commissioners for heeding the concerns of what he characterized as a small group of residents.

In Barnes' day, as now, things got personal.

In 1927, a local newspaper called the Mainliner published a cartoon showing him walking down a street in his bathrobe with a black toddler by his side. That year, an anonymous note from a neighbor to Barnes, who made his fortune from patent medicine, referred to him as "a clap doctor" and "a nigger lover."

No such language is used these days. But Glanton argues that there is more to the current opposition than concern about art, traffic or pollution. It's an expression of a "thinly disguised racism," he contends.

"There is no way you cannot see racism in the way they are treating the Barnes Foundation," Glanton, who is black, said in a recent interview.

He noted that during the opening of the gallery, the neighborhood protesters held signs that read "From L.A. To Pa., Money Buys Justice," an allusion to the O.J. Simpson trial, and "Lincoln University Go Home." Lincoln is the small, predominantly black institution in Chester County to which Barnes left his billion-dollar collection. Its trustees nominate the Barnes board.

Residents say Glanton is wrong. Their prime concern, they say, is increased traffic on tree-lined Latches Lane, which would threaten their health and safety.

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"They (Glanton and the foundation) have taken a sleepy art school and changed it into a Gettysburg-like museum," Marmon said. "It's now an international destination on our quiet residential street."

Barnes felt racism was a driving force behind those who criticized him. Of the many art-history students who enrolled at the foundation in the 1920s, several were black. Aside from his interest in French impressionism and modern art, **Barnes** was a collector of African art and saw himself as a celebrator of African American culture.

This month, Montgomery County Judge Stanley R. Ott denied Glanton's request to permit guests inside the foundation during a Nov. 11 fund-raising gala.

Glanton said there were "many who believe that the only explanation" for Ott's ruling is that **Barnes** had designated Lincoln University to name the foundation's trustees. He vowed to seek Ott's removal from the case. Ott's ruling was reversed by a higher court.

Barnes, who died in 1951, created the foundation with stringent restrictions on how its art could be exhibited, including strict limits on public visitation. Changes from his indenture must be approved by a judge. It was not until 1961 that a court permitted any public visits, and those were by appointment only.

Glanton continues to fight in court over the right to open the foundation six days a week and charge $10 admission. So far, to Glanton's disappointment, the court has permitted public visits just 3 1/2 days a week, with a $5 admission price.

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The university's trustees chose Glanton as director in 1990. A politically active lawyer who had been in the administration of Gov. Dick Thornburgh, he is a partner in the Philadelphia office of Reed, Smith, Shaw & McClay, and had represented Lincoln University.

Those who see themselves as the upholders of **Barnes'** vision of art say Glanton has shamelessly ignored **Barnes'** wishes on how, where and for whom the foundation's 800 paintings and 200 sculptures — including 170 Renoirs, 55 Cezannes, and 20 Picassos — can be displayed.

"We are reacting to what is happening to the foundation," said Nick Tinari of **Barnes** Watch, a group that has fought to preserve what it says are **Barnes'** wishes.

The group was particularly opposed to the collection's worldwide tour, including exhibits in Paris and Tokyo — a tour made possible after Glanton battled in court for months. The group also opposes the commercialization of the art through books, CD-ROMs and a gift shop. They cite **Barnes'** belief that art should have no monetary value.

Glanton and the trustees contend that they faced a situation in which the collection was threatened by inadequate climate control and poor security. His initial plan, to sell 15 pieces, raised a public furor and was ruled out by court order.

To preserve the collection, the foundation's 70-year-old limestone building needed extensive renovation, and to pay for it, Glanton said, the foundation needed to exploit its chief asset — its art. The tour earned $16 million, which paid for a $12 million face-lift of the building overseen by Philadelphia architect Robert Venturi.

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Barnes was widely criticized by art historians for the quirky way in which he displayed his collection: the dim lighting, the display height, the gothic hardware tackled to the burlap surface of his gallery walls. **Barnes** developed the unusual display so that the foundation's students could see the connections among works set out in a theory of art taught by himself and his followers.

Glanton says his actions have been motivated by a desire to protect **Barnes'** vision and collection, not to destroy it. He noted that **Barnes** often invited guests into the gallery, sometimes bringing in a piano.

"There was life here when Dr. **Barnes** was here," Glanton said. "We want to bring back that sense of life."

CAPTION:
PHOTO

PHOTO (4)

1. A visitor to the recently reopened **Barnes** Foundation museum in Merion contemplates the collection. A proposal to open the museum six days a week is tied up in a legal battle. (For The Inquirer/BARBARA JOHNSTON)

2. Ceil and Bernard Lipman viewed a wall of paintings on the first day of the museum's reopening this month. The foundation most recently has been embroiled in a controversy over plans for parking. (For The Inquirer/BARBARA JOHNSTON)

3. **Barnes** Foundation Director Richard H. Glanton visited

the Philadelphia Museum of Art when the **Barnes** exhibit was on view there in February. He sees some opposition as racial in origin. (The Philadelphia Inquirer/RON TARVER)

4. Dr. Albert C. **Barnes** left strict instructions regarding his art collection when he died in 1951.

APPENDIX G — LOWER MERION TOWNSHIP BOARD OF COMMISSIONERS MEETING MINUTES

BOARD OF COMMISSIONERS

GLORIA P. WOLEK, PRESIDENT

NOVEMBER 15, 1995

A stated meeting of the Board of Commissioners of the Township of Lower Merion convened at approximately 8 p.m., on the above date, in the Township Administration Building, 75 E. Lancaster Avenue, Ardmore, PA., Gloria P. Wolek, President presiding. Other members present were Commissioners: Davis, Ettelson, Lutz, Pierce, Prendergast, Rosenthal, Silver, Sonenshein, West, Zemble and Wolek, Commissioners: Kessler, Manko and McConnel were excused.

Approval of Minutes The Chair moved for the approval of the Board of Commissioners meeting of October 18, 1995. All voted aye. Minutes stand approved.

Announcements and Presentations

Report Out HOLIDAY — The Chair reported out that Thursday, November 23, 1995, Thanksgiving Day was a legal holiday. The Township Building would be closed for business. President Wolek commented at Thanksgiving time, we pause to count among our many blessings the goodwill of our family, friends and citizens of Lower Merion Township. The Board extends its very best wishes to all for a very happy and safe Thanksgiving Holiday. May you and those you love enjoy a most bountiful Thanksgiving season.

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Report Out — Executive Sessions: The Chair also reported out that the Board met in Executive Session on Saturday, October 28, 1995 and again on Wednesday, November 8, 1995 for discussion of matters of current litigation as well as matters of personnel. It was also reported out that the Board met earlier this evening for discussion of personnel matters.

Report Out — Workshop: The Chair further reported out that the Board also met for a workshop session at 6:00 p.m. this evening to receive reports from its professional staff.

Report Out — Public Hearing: The Chair reported out that the second Public Hearing on the Proposed 1996 Budget was scheduled for Wednesday, December 13, 1995 at 7:00 p.m.

Announcement — As a reminder to all residents as the winter season approaches, an Ordinance was enacted last year which prohibits parking of vehicles in the circular part of any cul-de-sac during a snow emergency. This was done by the Township so that snow and ice could be removed safely and effectively in the

Proclamation: American Education Week — November 12-18, 1995.

PRESIDENT WOLEK: How very fortunate the citizens of Lower Merion Township are to have the excellent educational climate that is available in our community. Tonight this Board would like to publicly recognize the dedicated service of the professional and support staff of the School District by proclaiming the week of November 12-18, as American Education Week in the township of Lower Merion Township. During this week we would urge our residents to join this Board

in commending the continuing efforts to prepare our young people for successful entrance into the "world of work" and further education.

Vice Presidents Lutz and Davis, joined President Wolek in the oval along with Dr. David Magill, Superintendent of Schools; Steve McCarter, President, Lower Merion Education Association; Arlene Flicker, Vice President of the Lower Merion Education Association; and Anita Miller, Communication Director of the Lower Merion School District who received the proclamation.

TOWNSHIP RETIREE

Hugh E. Byrne, Police Department

Commissioner West, Chairman, Police Committee and Superintendent Daly to joined President Wolek in the oval for the presentation.

PRESIDENT WOLEK: As always, it gives the Board great pleasure to recognize on the occasion of their retirements, the many years of service rendered by our Township employees. Tonight, the Board expresses its sincere appreciation and thanks to Officer Hugh E. Byrne of our Police Department.

Hugh E. Byrne retired from Lower Merion Township Police Department on November 1, 1995 after 29 years of service.

Hugh started his employment with the Township on October 10, 1966 as a Probationary Police Officer. He was promoted to Class C Police Officer in April, 1967, to Class B in April, 1969 and to Class A in April 1970. In 1984 he

transferred from Patrol Platoon #4 to the Juvenile Unit and worked there until 1986 when he transferred from the Investigations Unit to the Traffic Safety Unit and remained there for nine years until his retirement. When he retired, there were 27 letters of commendation in his Personnel file.

Hugh was always pleasant, helpful, kind hearted, hard working and well liked by his fellow co-workers. Hugh is very proud of his Irish heritage and most times will greet you with "the top of the morning to you" and have a big smile on his face.

Although Hugh is officially retired from the Township's Police Department, he is far from bored. He has recently joined Eastern College's Security Department and will be working with another former Township Police Department employee, Captain Jack Sheehan.

Hugh was presented with a gift certificate for dinner and flowers for his wife.

PUBLIC HEARINGS:

The Floor is now open for four public hearings this evening.

PUBLIC HEARING NO. 1

The first Public Hearing is on An Ordinance to amend Chapter 155 of the Township Code entitled, Zoning, by amending Section 135B and 136B to provide that an accessory building which exceeds fifteen feet (15") in height must conform to the side and rear yard setback provisions of the zoning district in which it is located.

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Bob Duncan, director of Building Regulations/Permits will summarize the amendment.

MR. DUNCAN: This is an amendment on the accessory structure provisions of the Zoning Code. Under the current Code, an accessory structure can go as close as five feet to a side and rear property line and can result in a height of thirty-five Feet high, and that has created an impact on a couple of sections of our community because of the building being so high and close to the property line. In order to address those concerns, we have drafted an amendment that will require that a building, an accessory building built under those provisions, is to be limited to fifteen feet in height. If someone wants to build a larger accessory structure, they have to meet the principle building, setbacks after this ordinance is adopted. That concludes my report.

MRS. WOLEK: Thank you. Is there anyone who wishes to address the Board of this amendment?

(NO RESPONSE)

MRS. WOLEK: Hearing none, I will declare this public hearing closed.

PUBLIC HEARING NO. 2

MRS. WOLEK: The second public hearing is on an ordinance to amend Chapter 155 of the Township Code, also entitled Zoning by amending Section 155.4 to amend the definition of "antenna" to exclude satellite earth stations twenty-four inches in diameter or less. Bob?

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MR. DUNCAN: this is an amendment that is proposed to keep up with current technology. The current technology allows for some satellite dishes to be as little as eighteen inches in diameter. We felt that they weren't the type and size of dishes that wanted to regulate, so we are excluding twenty-four inches from antenna requirements.

MRS. WOLEK: Is there anyone who wishes to address the Board on this amendment?

(NO RESPONSE)

MRS. WOLEK: Nobody being heard, I will close this public hearing.

PUBLIC HEARING NO. 3

MRS. WOLEK: The third public hearing is on an ordinance, also zoning, Chapter 155, section 141.1.1, establishing regulations for the installation and maintenance of cellular communication antennas in all zoning districts. Bob?

MR. DUNCAN: This ordinance was drafted as a result of recommendations made by the County Planning Commission in order to address some of these standards and FCC regulations. The purpose is to accommodate the need for cellular communications antennas and also regulating the location and number; also to minimize the visual effects of these antennas and the support structures through proper design and screening; to avoid any potential damage to adjacent properties from the antennas and support structures; and encourage the joint use of antennas and new support structures.

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It provides for definitions within the ordinance. It establishes use regulations. These antennas that are built that are either utilizing existing towers or built on existing structures which exceed no more than fifteen feet higher than existing structure, will be permitted by right in any district. If it's a new tower being proposed, or if it's a tower being proposed on an existing structure that exceeds the fifteen-foot height limitation, it will be permitted by special exception from the Zoning Hearing Board.

Some of the standards for the special exception will relate to the antenna height, setback requirements, support structure safety, fencing and landscaping.

It will also address the requirement to accommodate other users. They will be obligated to provide space for other users. There are also parking requirements, licensing requirements from the Federal Communications Commission. There will be standards, based on the height of the antenna structure, addressing the color of the structure, according to the background, color of the trees in the background, sky as the background.

There will be requirements for sight plan submissions showing compliance with all of these standards, as well as all the other standards within the Township Code.

MRS. WOLEK: Does anyone wish to address the Board on this amendment?

(NO RESPONSE)

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MRS. WOLEK: Hearing no response, I will declare the public hearing closed.

PUBLIC HEARING NO. 4

The final public hearing tonight is the First Public Hearing on the 1996 Proposed Budget.

The floor is now re-opened for the first public hearing on the 1996 proposed budget. This is an opportunity for any interested citizen to comment on this proposed budget.

The President called for anyone who wished to address the Board. No response was heard. Therefore, she declared the public hearing closed.

Public Comment:

The Board will now receive public comment on matters relating to agenda items which will be voted upon at this meeting.

I would remind our residents of the Board's policy concerning public comment. It is the policy of this Board to limit each speakers remarks to three minutes — and we will strictly adhere to this policy. At the end of the three minute time limitation, the speaker will hear a time go off indicating the three minutes time limitation has elapsed.

Further, it is also the policy of this Board to listen to your concerns, but not to respond at this time as the Board does not get into problem-solving here and now. Also, it would be appreciated if there are many people here addressing the Board

on the same topic, that a spokesperson be appointed to represent the view of the group.

The first name on the sign in sheet was Richard C. Moss, representing a group of neighbors, reported his group had no position, either pro or con, on the Edwards property. He noted it was a highly technical issue and asked the Board to take into consideration the many unanswered questions. He noted his group has shown continuous interest in the development of this property and asked to be kept involved as the matter proceeds.

Dr. Ed Hanhaussen, 516 Oriole Lane, Villanova, handed out an article concerning a vicious rape on a nurse at the Devereux Foundation's Brandywine campus in Glenmoore. He strongly felt this type of danger should not be brought into Lower Merion Township. He asked for the Board's careful consideration for this development.

Michael Farrell, 533 Oriole Lane, Villanova, felt no one was speaking for Mrs. Edwards an her intent of perpetuating the property as a charitable institution. He noted the current plan made no commit to that dream.

Pam Coath, 1602 Lark Lane, spoke to the loss of remaining open space in the Township.

Response to Public Comment — Announce this is now the appropriate time for any member of the Board, the Township Manager, or designated staff person to address and correct any statement made by a member of the public during the Public Comment portion of the agenda.

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Hearing no response, the President declared the Public Comment portion closed.

Public Privilege of the Floor

The Floor is now re-opened to provide the opportunity for the public to address the Board on any non-agenda item or any other public matter in which the Township has jurisdiction or authority. The same terms on the Board's policy for Public Comment also hold for this portion of the agenda.

The following individuals addressed the Board:

Deborah Colgan: 112 Righters Mill Road, spoke in support of the Township's preservation areas. She asked the Board to look at:

- educating the residents what the Township intends with the preservation areas. She did not feel the Building Regulations Department sufficiently staffed to handle this.

- monitoring the preservation area during actual construction.

- identifying the correct trees to be removed during the creation of the preservation area, and the monitoring of same.

- monitoring of what survives in the preservation area in the future, be it a homeowner or an association.

She felt the Township needed to look at these areas since there will be many more preservation areas to come.

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PRESIDENT WOLEK: I see there are a number of individuals interested in the Barnes matter; and before I turn it over to the public for their comment, I'm going to recognize Jim Ettelson who might give us a summary as to what has been approved of recent.

MR. ETTELSON: Thank you, Madam President, thank you, Commissioners, for allowing me the privilege of addressing you during this session of the meeting.

As you all know, this isn't the first time we have addressed some of the problems that I'm going to bring before you tonight. I'm sorry to say that although we have had somewhat I would consider to be limited success with the renovation that has taken place in Merion by the Barnes Foundation, I am unable to report to you that it has been a complete success. And, frankly, two years ago, or a little over two years ago, I had anticipated at least at this point in time, coming before you with what I could consider to be a relatively happy event. The Barnes Foundation, as you know, undertook severe and serious renovations, beginning approximately thirty or thirty-two months ago. During that period of time, there were numerous meetings by members of our staff, by myself, several commissioners, members of the civic association, sometimes neighbors. And, frankly, during that period of time, the main concern at that time was that the construction that was taking place at the Barnes Foundation, which is located on a quiet street, North Latches Lane in Merion. Our severe concerns at that time were the effect that this construction would have on the neighborhood. Well, I have to tell you that at least during the period of time of construction and renovations, I felt that efforts were made to try and eliminate negative impact on the neighborhood. And with the exception of a few instances, I think that that was accomplished by the Barnes Foundation.

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The second and most major concern was what was going to happen when the Barnes reopens. What we have and what we have learned over the past two years is, that in this community, in our community, is a worldwide, world renowned gem. Many people knew it before; now the world knows it. A worldwide tour to many countries, several countries, rather, at which paintings were displayed called the attention of the world to probably what is unique in the world in terms of modern art.

And now that there is a reopening planned by the Barnes, we can expect that possibly the world will come to visit Lower Merion. This could have been, and could possibly be, a major advantage for this community. However, after all of these meetings and all of the efforts at cooperation and all of the pledges of cooperation by members of the Barnes, today we stand on the eve of the reopening.

Many of my neighbors are here to speak to you. And, frankly, we don't know who is coming. We don't know how many are coming. We don't even know when they are coming. We don't know where they are parking. As a matter of fact, with all of the discussions that took place during all of this time, the only thing that we do know tonight is there is a tremendous potential for Chaos I am coming before you now to tell you that during the new business portion of our meeting tonight, I am going to be asking for a resolution. I have asked officials at the Barnes Foundation to postpone this opening. I have asked them to postpone this opening because I don't think that they are prepared to open and control the impact on this quiet residential community. It is impossible for me to believe that the same genius and the same experts and the same professionals that planned this magnificent restoration, that were able to send paintings all over the world and bring them back

to Merion, at least in condition, we hope that is what it was before, that were able to develop a CD-ROM program that is second to none in the world, that will show people how museums should be seen, that were able to raise millions of dollars to fund this restoration, this same group, these same people, the brightest minds, some of them in the art world and some in the business world, are unable to control all of the events that are going to take place starting tomorrow. I have to say that they are unable. I would hate to say that maybe they are unwilling because I can't believe that. It is difficult for me to believe that these people are not willing to plan for this reopening. However, I must tell you that if they're unwilling to plan or unable to plan, I am calling upon you, my fellow Commissioners in this Township, to do the planning for them.

I am going to be bringing a resolution before you to tonight to ask the Barnes to postpone this reopening. Failing in that, I'm going to ask you to pass the same resolution which calls for the Township's staff, the Superintendent of Police, Director of Building Regulations, our Township Manager who has remained so active in this, and our Township Solicitor to take all steps necessary to make sure of the peace, health, safety and tranquillity of this neighborhood. We must live together and we will live together. But, frankly, the neighbors, including the Barnes, should not suffer. But if anyone has to suffer, the neighbors will not suffer. And I would pressure your support when this eventually takes place tonight.

Thank you very much.

MRS. WOLEK: Thank you. There are seven people who have signed up, and the first one is Michael Lev-Toaff.

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DR. LEV-TOAFF: Good evening. My name is doctor Michael Lev-Toaff. I live on North Latches Lane. I moved to North Latches Lane about eight years ago. I invested a lot of money in my home because I was very happy to live on such a magnificent street, which was not only beautiful but tranquil, and I wanted to enjoy the quality of life that this would allow me.

In the last week we have seen what we have, what the future will bring if we will allow it to happen, the chaos, the traffic that took place in our street in the last week is simply unbearable. There is no question that the Barnes Foundation changed its character in the last couple of years from a primarily educational institution with limited access to the public, into a commercial museum, open and welcoming hundreds and hundreds of people coming from far away, driving their own cars, with no solution to the traffic, the noise that will take place in our street. Our street is very narrow, and when a line of cars is parked on one side, there is absolutely no space, or barely any space, for two cars coming from opposite sides. And what is happening now, when cars are stopping to buy tickets, to identify themselves at the entrance to the Barnes, immediately there is chaos there. The traffic comes to a standstill. This is a residential area, and there is no room for a commercial museum in a residential area. This is something that I am expecting our own Township to protect us from. We feel cheated. We moved into a residential area and we do not want to suddenly lose everything. Had I known what I have seen in the last week, it is very questionable that I or anybody else of our neighborhood would have chosen to go through the enormous investment of everything we have to live on that street. And I am calling some — this body to protect us. We are good citizens, and there is no reason to allow something so outrageous to take place in our neighborhood. Thank you very much.

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MRS. WOLEK: State Representative Lita Cohen?

MS. COHEN: Thank you. Good evening, Representative Cohen gave a brief update on current state legislative matters and offered the following remarks.

MS. COHEN: The fourth and last issue, I speak to you as a private citizen, a neighbor, a close neighbor of the Barnes Foundation. I have seen again, I think Dr. Lev-Toaff and certainly Commissioner Ettelson were very eloquent. But I am concerned about the health, safety, and welfare of my neighbors and my family. We have little children on that street who live there. We have the children that go to Episcopal Academy. And we are endangered. Our freedom to practice our religion is severely inhibited by cars intruding upon our Sabbath, and being very disrespectful of our privileges on the Sabbath. These cars come on our lawns. We are in danger. You, the Commissioners, are the only people that can help us remain safe and healthy in our neighborhood and in our homes. So I plead with you and implore you to do everything you can to keep us safe, keep us healthy, respect our rights to practice our own religion, and to be sure that Barnes remains an adequate neighbor that is obeying all the laws and rules and regulations.

MRS. WOLEK: Thank you. Stephen Asher.

MR. ASHER: Thank you very much. I appreciate the opportunity to speak. My name is Stephen Asher. I live at 301 Latches Lane. I am directly across from the entrance to the Barnes. In that capacity my driveway serves effectively as an annex to the Barnes. Trucks turn around in my driveway; they go in, go out. I have four children that walk to school at Solomon Schechter Day School, Akiba Hebrew Academy. We are

frightened for their life, their well-being, and the well-being of all the other children who live on the street. Some facts are very clear. Number one, Latches is residential. It has always been residential, one of the most beautiful residential blocks in southeastern Pennsylvania. Number two, the institutional use by the Barnes, by Episcopal, by Saint Joseph's has historically been consistent with that use. Some institutions, especially Episcopal, Saint Joseph's, have gone out of their way to be sensitive to the needs of the neighbors and their concerns. Number three, it is indisputable that the Barnes has transformed its use. You only have to go to the Visitors Bureau downtown and pick up any of the handouts and you see that Barnes is hawking package tours, with hotels and free parking — I assume they mean on my front yard — to people all over the world. They are projecting 150,000 visitors a year. There is no question that the use is as commercial as commercial as can be. I would prefer if Kraven would build a mall across the street because we would get less traffic and less intrusion than we expect to get from the 150,000 visitors to the Barnes. What do you do when you have an institution transforming its use and violating its zoning because it is a residential district and the use is commercial? Well, you know what you do. If I entered into a lease tonight with Mobil to put gas tanks on my front lawn and opened up a gas station, you would be down there in a minute with a cease and desist order. You would close it down. And you would say, Steven Asher, this is Latches Lane. You can't open a gas station on Latches Lane. You've got to shut down. Well, that is what you will have to do here. Because they are outside of their zoning obligations. They are in violation. The continuity and well-being of the neighborhood is at stake. It is not going to be easy, as the Barnes legacy, the people guarding the Barnes legacy, knew. To go in battle against the Barnes is very difficult. They have unlimited access to lawyers, and it

will not be easy to take them on. But we entered into a contract. When we moved into that neighborhood, we made a commitment to the township. We're going to stay there. We hope the Commissioners will abide by their part of the contract, protect our rights to live in a residential neighborhood and protect the future of our children.

Thank you very much.

MRS. WOLEK: Robert Marmon.

MR. MARMON: My name is Robert Marmon, and I live at 339 North Latches lane. I am frightened and not angry. I am frightened that you, our elected representatives, will abandon us. I am frightened that you will allow one of the loveliest, peaceful, special residential neighborhoods in the township to be lost, to be forever changed. For nearly two decades my wife and I have lived quietly and peacefully on North Latches Lane. Our child was born in 1980, and she knows only one home, one neighborhood. For sixteen years we hardly knew the Barnes Foundation was across the street. They were good neighbors. Then, something changed. We didn't change. We did nothing wrong. Outsiders have taken over the Barnes people who have no attachment to the neighborhood, to the life we have quietly enjoyed. We have been citizens here for decades. Mr. Glanton and his people have not been. We have been voters here for decades. Mr. Glanton and his people have not. And most importantly, we have been taxpayers here for decades, and Mr. Glanton and his people have not. I now finally understand what a carpetbagger is and how one operates. We have videos of what they have done so far, and it would break your heart. As someone said, if it looks like a duck, if it walks like a duck, if it quacks like a duck it is probably a duck. If it looks like a

museum, if it's operated like a museum, if it promotes itself like a museum, it's probably a museum. Museums are prohibited in residential neighborhoods under existing zoning laws. They have taken a sleepy art school with a minuscule gallery component and have changed it, changed it into a Getty-type commercial museum, an international destination museum on a twenty-four foot wide residential street. Let me ask each of you a question. With the future of Latches Lane in question, with the congestion, pollution, crowds and noise on this little twenty-four foot wide street, would you choose to move there, to live there, to raise your children there? How would you react if this were happening to your home? You would be frightened, as I am. We wonder and hope and pray, as I am, that your elected representatives won't be intimidated by a bully, a man spending money he has not worked for, money he did not earn, in a way that destroys a neighborhood he doesn't live in and doesn't care about. You would hope and you would pray your elected officials don't abandon you. Therefore, I am asking you, I am pleading with you, I am begging you — not for special privilege, not for special consideration — but simply to enforce the laws already on the books, laws meant to protect us all from what Mr. Glanton has done. Please help us.

MRS. WOLEK: Bruce Schainker.

MR. SCHAINKER: Thank you. My name is Bruce Schainker, and I live at 225 North Latches Lane. I have lived there for nearly ten years. I am speaking regarding the Barnes Foundation. Basically my thoughts, my wife's thoughts are that we feel abandoned by the Commissioners of Lower Merion Township and we feel that we have been duped by the officials of the Barnes Foundation. Our neighborhood concern with congestion on our tranquil residential street goes back many

years. We have had meetings with Lita Cohen when she was Commissioner. We have had several meetings with Mr. Ettelson. There were problems prior to the Barns restoration. We live on a very narrow street, twenty-four feet wide. There is parking on the east side of the street over portions of that street, including where I live. It is difficult to turn out of my drive because there's cars allowed to park directly across my drive. There is a tremendous amount of traffic on the street, due to traffic from Episcopal Academy, Saint Joseph's University, and the Barnes Foundation — not only visitors but also the students who come to the Barnes Foundation. On tranquil weekends when the Barnes was open to the public, large buses would park on our street. People would just be allowed to disembark from these buses on the west side of the street where car parking is not allowed. We would find them on our lawns, we would find them picnicking on our lawns, we would find them taking pictures of our homes. This is not exactly what we liked. We also smelled the exhaust fumes of the diesel engines of these busses that were waiting for their passengers to reload hours later. With some assistance we were able to modify the ingress and egress of people into the Barnes during open hours. However, the concerns about the congestion on the street were certainly paramount in our minds. Now, this seems to have been magnified. This past week the Barnes Foundation has had open houses or actually special parties for contributors where 500 people and 300 people have appeared on a couple of nights during this week and our street has been gridlock. We have had policemen directing traffic. It has taken me ten minutes just to turn onto my street from Old Lancaster, and another ten minutes to get into my drive. I have found people parking on my private drive because there is no where else to park. The Barnes had assured us through Mr. Ettelson that they were going to alleviate traffic concerns by having off-site parking. Evidently, this

thought was abandoned, and we were not told about this until really just recently. We had a meeting with Mr. Ettelson, the neighbors with Mr. Ettelson this past summer, and even at that time we were led to believe that there would be off-site parking for people coming to Barnes Foundation. Mr. Glanton at the Merion Civic Association rather ambiguously said that that was not — it didn't turn out to be a reasonable alternative. He offered no explanation. Mr. Glanton also said that access to the Barnes would be very controlled because there would be tickets that would be required to get into the Barnes and these tickets would be mailed to people ahead of time and it would control traffic. He declined to let us know how many people he would allow in at any one time at the Barnes, how many people he expected each day, how long each person on the average would stay, Well, Mr. Glanton actually lied to us at the Merion Civic Association because he has opened the Barnes without any plans for ticketed reservations. People will be coming for a free-for-all actually. We expect our street to be gridlock. People have already talked about the danger of our children who are walking to school. We have many people walking on this street and we are very concerned about their safety. But I also feel very abandoned by the Commissioners. Here we have an institution which was basically an educational institution, and it is clear over the last several years that this institution has transmortified into a commercial museum. I don't understand why zoning usage's have not been questioned. The museum is charging a fee. They've upped their fee. They want more people. They have a museum shop. They have built a building on the property.

MRS. WOLEK: Your three minutes are up. If you would wrap up quickly?

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MR. SCHAINKER: In summary, I would wish that the Commissioners would look at the zoning usage of this property. I do not feel that its use, starting tomorrow, is in keeping with zoning regulations. Thank you.

MRS. WOLEK: Thank you.

MRS. WOLEK: Anna Lev-Toaff.

MRS. LEV-TOAFF: I live at 379 North Latches Lane. I want to speak on behalf of all of the children and pedestrians in our neighborhoods. I am the mother of four children. I am a physician. I'm not home to guard their safety during the day. Our street is a major pedestrian thoroughfare for multiple educational institutions in the neighborhood. To list some of these, it's the Akiba Academy, it's the Adeth Israel educational facilities, it's the Bala-Cynwyd Library, it's the Solomon Schechter Day School, it's the Saint Joseph's University, it's the Episcopal Academy. Those are all that I can think of right now. So we have hundreds of students traversing our neighborhood. We have one sidewalk on our street. There's a sidewalk on one side of the street, and that is the same side that the Barnes occupies. So that this week coming home I nearly knocked into a jogger because he couldn't pass on the sidewalk in front of the Barnes and had to cross into the street and I came very close to not avoiding him. And I think that is just for me a small warning experience of what could happen in our street. Thank you.

MRS. WOLEK: Is there anyone else who wishes to come forward and address us?

DR. MOSTER: My name is Doctor Mark Moster. I live at

261 North Latches Lane with my wife, who is also a physician, and we moved into the neighborhood in 1988. I have the exact same concerns that all the neighbors you have heard have in terms of the congestion on the street, the pollution, the safety of the children, the tremendous amounts of traffic that will come through, and that it will be uncontrolled. When we moved into the neighborhood, our area was rezoned, and it was told to us in this room that it was rezoned because we wanted to preserve the character of the neighborhood. We bought a house that was in terrible condition. It was the original Woolworth estate, the Wanamaker estate, and we fixed it up. We put in about as much money to fix it up as we did to buy it. And we were reassured when we came here that this body and the Zoning Board were interested in preserving the character of this neighborhood. And what we are seeing now is a tremendous difference in terms of the character of our neighborhood. And I would ask you to please consider that in looking at this issue. Thank you.

MRS. WOLEK: Is there anyone else who wishes to come forward?

DR. GINSBURG: My apologies. I'm Doctor Ginsburg. I might be reiterating. I just got out of the operating room. I'm at 451 North Latches, across from Episcopal Academy, and I have four children, and I came home to seeing a wife quite upset. My children are seven weeks through seven years. And my wife, when she tries to cross the street to get to the bus stop, there is no space. You have to cross to the other side because of the sidewalk. Can't do it. So she started to try and get a stop sign to try and stop cars, just to be able to cross, and she's been frantic, especially when our street became one-way twice yesterday, where we could not go both ways. I just wish that you all could appreciate what it is like to have small children

and to try and live in a neighborhood where you thought that you were very pleased to live with such wonderful educational institutions, but where your children truly are not safe. I can't tell you how many times I have had cars now going in and out of my driveway. I just spent ten thousand dollars to fix my fence so I can now close my fence. That is the kind of fear that I have. The cars just — I don't know what they are doing — but they just travel in and out of our property or try and turn around because it's one-way. This has been a problem to begin with. I really fear for the future of our neighborhood. I don't know what it will be like if we all have to start selling our homes all at once on North Latches Lane because we are really concerned. We really came there just hoping that we could have a neighborhood. I'm proud to be on the street with the Barnes Foundation. I think it's one of the great educational institutions. Penn made a huge mistake many years ago when it had an opportunity to become involved. But it is a wonderful educational institution. It is not a museum. If it is a museum, tell me. I wouldn't have bought my home, and I would leave, and it's just not where I want to be. I implore all of you. This is a unanimous feeling. It's one that I only came on late, two weeks ago, when I heard what the Barnes had to say and when someone from the Barnes said we really compromised. We moved the fence back fifty feet so that you can at least put a bus into the area. And I measured. It's sixteen or seventeen feet, not quite fifty feet. Have you ever sensed the feeling where you are just not hearing the whole truth? I promise you. I'm not paranoid. There's something else going on here. I don't know what else is going on. But although this is a major Alamo in that our street will be destroyed if there is more congestion. I have a feeling we are just beginning. Thank you very much.

MRS. WOLEK: Is there anyone else?

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PHILIP GLICK: My name is Philip Glick. I live at 45 Raynham Road, and I want to echo some of the same comments that my neighbors have made tonight. I moved to this neighborhood very deliberately about nine years ago. I previously lived in south Jersey. I searched out over thirty neighborhoods in the Main Line when I decided that I wanted to move my family and now four children to this neighborhood. It was a very conscious decision. I bought one of the big old houses around the corner on Raynham Road. And I have been renovating it with every cent I thought I have was ever going to get — frankly, more than I will ever have. I love the neighborhood. And what attracted me to neighborhood was a community feeling and the safety of the neighborhood. And when I think of the problems that these proposals for the Barnes Foundation are creating, I can't help but feel outrage and fear. This is a community. This is a residential neighborhood, and extraordinarily beautiful neighborhood. This meant a lot to my wife and my children. I moved here to be within walking distance of the schools, the synagogue. I have been a very active supporter of the community. And I think we have a right to ask the Commissioners here to protect that life-style, to protect the reason that we all live here as part of the beautiful, very well-established community. I love the idea of the Barnes Foundation also, but as an educational institution, not as a major public library or museum. I echo comments of one of my neighbors, Bob Marmon. If they want to have a beautiful collection an appropriate place for the foundation and its collection, it could be the Philadelphia Museum of Art. I think that is an appropriate statement. But if that is not going to happen, then as a real practical issue, we want to have the traffic congestion out of our neighborhood. This morning when I took my kids to school, I literally couldn't get up that street. This evening I had a very late business meeting; I didn't get home until 7:30. There was

still congestion on that street. There were still people parking, coming and going from the Barnes Foundation. That is not what was represented. So I am asking you, both from a practical fairness standpoint and as my neighbors, to consider our objections and to work with us reasonably to control something that could be very, very bad. And I echo what Dr. Ginsburg said. I bought this home nine years ago. This was a very conscious decision. Don't take away the sense of community and the beautiful neighborhood that we have. Please support us. Thank you.

MRS. WOLEK: Is there anyone else?

(NO RESPONSE)

MRS. WOLEK: Then I will declare this part of the meeting closed.

Response to Public Privilege of the Floor — This is now the appropriate time for any member of the Board, the Township Manager, or designated staff person to address and correct any statement made by a member of the public during the Public Privilege of the Floor portion of the agenda.

Hearing no response, she declared the Public Privilege of the Floor closed.

CONSENT CALENDAR

The Consent Calendar items are indicated with a "(CONSENT)" notation in the immediate left-hand column next to each Committee item on the stated monthly Board agenda. If there is no request from any member of the Board for separate

discussion on any item listed on the Consent Calendar, in which event the item would be removed from the Consent Calendar and considered in its normal sequence on the agenda.

The President recognized the Township Secretary for the reading of the roll for the vote. All voted aye with the addition of the item from the Health Committee meeting held at 7:55 p.m., November 15, 1995.

ADOPTION of ORDINANCE NO. 3403 — The Chairman presented for adoption:

AN ORDINANCE TO AMEND the Code of the Township of Lower Merion, Chapter 133 of the Township code entitled, Streets and Sidewalks, to provide that it shall be the duty of owners of abutting property to keep sidewalks or public walks in good order and repair, free of horizontal cracks or a difference in elevation of more than one inch.

This Ordinance was authorized for advertising at the October 18, 1995 meeting of the Board of Commissioners and duly advertised in the November 2, 1995 issue of the Main Line Times.

* * *

General

Old Business — Commissioner

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Sonenshein requested some discussion on the conduct of the voting machines in the November election. He found them to be handled in a most disgraceful way, wherein he felt because of the delays, some people were denied the right to vote. President Wolek ruled that this item would appear on an Assessments and Procedures Committee agenda for discussion after the first of the year.

Commissioner Rosenthal alerted our residents that the 1996 winter recreation guide would in the mail shortly.

Vice President Lutz noted the changing conditions in the area of Ward 3 where the Township pistol range is located due to new homes which are now in the area. He asked that the issue of the generating of noise be looked into and that the Township Manager investigate methods of suppressing this noise.

This matter assigned to the Police Committee.

Vice President Davis supported the above-noted requests.

New Business — Commissioner Ettelson introduced the following Resolution and urged the full Board to support it:

WHEREAS. On September 7, 1995, The Barnes Foundation

(Barnes) announced that its Gallery would be reopened to the public following the world tour of its Great French Paintings collection and a 32-month, $12 million renovation of its Gallery; and

WHEREAS. It was further announced that due to the limited capacity of the facility, public visitation would be managed through the use of a telephone reservation system in order to handle the estimated 120,000 visitors in the first year; and

WHEREAS. The residential neighborhood in and around the Barnes currently experiences a considerable lack of parking and serious traffic problems; and

WHEREAS. There are serious concerns whether the proposed use of the property by Barnes complies with the Township of Lower Merion's Zoning Code; and

WHEREAS. The Barnes has to date not established an adequate or efficient system to properly manage and control the crowd movement and parking requirements to accommodate the projected number of daily visitors; and

WHEREAS. Efforts of the Township to work with Barnes' representatives have failed to properly and efficiently remediate problems of traffic flow and parking associated with a recent series of special events held prior to the anticipated reopening of November 16, 1995; and

NOW, THEREFORE, BE IT RESOLVED, that the members

of the Board of Commissioners of the Township of Lower Merion do hereby formally request that appropriate officials of the Barnes postpone indefinitely the reopening of the facility until such time as firm plans have been established and reviewed with the Township in order to manage and maintain effective crowd control, adequate parking, and the traffic volume associated with the reopening; and

BE IT FURTHER RESOLVED, that if the decision is made to continue with the planned reopening of the Gallery, the Township Solicitor and staff are hereby directed to take any and all appropriate actions necessary to maintain the peace, safety, and quality of life of the surrounding neighborhood and its residents and assure that the operation of the facility by the Barnes Foundation complies with the Township of Lower Merion's Zoning Code.

Dated this Fifteenth day of November, 1995, at Ardmore, Pennsylvania

> Motion was made for approval with all voting aye, except Commissioner Silver who abstained. Motion carried.

Vice President Davis reported on his appearance before Judge Ott of the Montgomery County Common Pleas Court pursuant to the disinterment of the graves in the Jewish Cemetery in Gladwyn. With respect to the Barnes matter, Vice President Davis gave his assurance that this Board had not abandoned the community concerns in this matter. Commissioner Sonenshein echoed the feelings of Commissioners Davis and Ettelson. Commissioner Pierce commented that when problems arise in Ardmore, she hoped these problems would be considered just as forcefully.

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ADJOURNMENT

RESOLVED, that this meeting of the Board of Commissioners of the township of Lower Merion stands adjourned. The next meeting of the board will be the Second Public Hearing on the Budget scheduled for Wednesday, December 13, 1995 at 7:00 p.m. The next stated meeting of the Board will be Wednesday, December 20, 1995 at 8:00 p.m. in the Board Room.

Meeting adjourned at 9:30 p.m.

Respectfully submitted,

Eileen R. Trainer, CMC
Township Secretary